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Executive Freezing Order Prohibiting Payments by Banks to Nationals of Foreign Countries

An executive freezing order, prohibiting payments by banks to nationals of foreign countries except as authorized by the Secretary of the Treasury, does not prevent a levy under a warrant of attachment on the bank account of a foreign national, nor does it affect the court's acquiring dominion, by virtue of such a levy, over the defendant's rights and interest in the account. Commission For Polish Relief, Ltd. v. Banca Nationala A Rumaniei, Supreme Court, Appellate Division, 30 N. Y. Supp. (2d) 690.

The prohibition extends only to the payment or transfer of the funds. The sole purpose of the order was to prevent the funds of certain foreign nations and their nationals from falling into the hands of the aggressor powers. To accomplish this proper result and for no other or different purpose, the banks in this country are prohibited from paying out or transferring credits due to such foreign nations or their nationals, without first obtaining the required license from the Treasury Department. Neither the government nor its Executive intended to do away with a creditor's right to attach "frozen" or "blocked" funds, or with the debtor's right to assign to another his claim to such funds.

In this case the assignee of Polish bank's claim to gold which had been delivered to Rumanian bank for safekeeping instituted conversion action against Rumanian bank, and served writs of attachment against New York banks in which Rumanian bank had deposits. It was held that the Supreme Court of New York had jurisdiction in rem, notwithstanding that prior to service of writs of attachment an executive order

freezing Rumanian funds in the United States was issued. The executive order freezing the Rumanian funds in the United States did not prevent a valid levy under the writ of attachment on the Rumanian bank's deposits in the New York banks. Under the levy, the court acquired dominion over the rights and interests of Rumanian bank in the deposits, which were an attachable res. The executive order merely provided a regulatory plan and operated exclusively in personam on the New York banks and had no other legal effect.

The facts are set forth in greater detail in the following paragraphs quoted from the court's opinion:

This action was brought to recover $3,060,704, for alleged conversion by defendant of gold bars of that value. The facts are undisputed. The German army invaded Poland in September, 1939. The Bank of Poland, at Warsaw, sought to transfer its gold reserve to a place of safety, and caused fifty-one cases of those bars to be delivered to the defendant, at Bucharest, for safekeeping. The defendant received and receipted for the gold. While it was thus held, the Bank of Poland duly transferred its right, title and interest therein to the Polish Food Commission, Inc., duly organized under the laws of the State of Delaware for the purpose of carrying on relief among the Polish population and refugees, which corporation sent its agents to Bucharest to take possession of the gold. The defendant refused to deliver it, stating, inter alia, that the German authorities had made claim to it. Thereafter, the claim to the gold was duly assigned to the plaintiff, a domestic corporation, also organized to carry on Polish relief. This action was commenced by the issuance of a summons and a warrant of attachment, dated, respectively, December 18 and December 19, 1940. The warrant was duly served on a number of banks in the City of New York; and a large amount of credits and gold belonging to defendant was thus sought to be attached. In February, 1941, defendant made a motion that the Supreme Court of New York decline jurisdiction on the ground of "forum non conveniens." This motion was denied on April 2, 1941. The parties at that time, by stipulation, reduced the amount under attachment to $4,000,000, held by three New York banks, as follows: Chase National Bank, $2,220,955.30; Irving Trust Company, $673,802.89; National City Bank, $1,105,241.81. On October 10, 1940, before the warrant was issued, payments from bank accounts of Rumanian nationals, therefore including defendant, had been prohibited by Executive Order No. 8565 of the President of the United States, amending Executive Order No. 8389, as amended, 12 U. S. C. A. § 95 note, unless such payments thereafter should be authorized by

Treasury regulations or licenses. In common parlance, this is a "freezing" order, authorized by section 5(b) of the Trading with the Enemy Act, passed October 6, 1917, 40 Stat. 411, as amended May 7, 1940, 54 Stat. 179, 50 U. S. C. A. Appendix. Such Executive Order in pertinent part reads:

"Section 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (I) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (II) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

"A. All transfers of credit between any banking institution within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

"B. All payments by or to any banking institution within the United States;

"C. All transactions in foreign exchange by any person within the United States;

"D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

"E. All transfers, withdrawals or exportations of, or dealing in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

"F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

"Section 3. The term 'foreign country designated in this Order' means a foreign country including in the following schedule, and the term 'effective date of this Order' means with respect to any such foreign country, or any national thereof, the date specified in the following schedule: . . . (f) October 9, 1940—Rumania. . . ."

Concededly, the wording relating to the prohibited transactions, "A" to "F" inclusive, has remained unchanged since a date prior to the attempted levies. The Secretary of the Treasury has issued no authorization in the form of license, or otherwise, to the Sheriff of the County of New York, the plaintiff, or the banks, with respect to the bank deposits, supra, claimed by plaintiff to be the subject of valid attachment herein. Certain relevant applications for licenses have been denied, in effect without prejudice. These were made by the banks

to the Secretary of the Treasury for licenses to transfer the amounts deposited, respectively, to the name of the Sheriff for the account of this action. The ninety-day period within which the Sheriff was required to bring an action to collect the amounts (Civil Practice Act, § 922, subd. 1) has been extended by various orders (ibid.), until December 30, 1941.

No question is here raised as to the validity of the attachment, the alleged levies thereunder or the service of process made upon the defendant, except the fundamental one raised by defendant, appearing specially, that because of the effect of the Executive Order (1) the levies failed to subject any property of the defendant to the jurisdiction of the Supreme Court, and (2) that such court has no jurisdiction in rem. The appellant contends that its bank deposits were rendered unattachable by the Executive Order, which Order "blocked" or "froze" its accounts, and that in consequence the court has no jurisdiction of the cause, there having been no personal service of summons upon defendant. The answer to this fundamental question will be dispositive of the appeal.

Upon the undisputed facts, we are of opinion and decide (1) that the Supreme Court acquired and has jurisdiction in rem; (2) that the Executive Order, even in the absence of a license thereunder, did not prevent a valid levy under the attachment upon each of defendant's bank accounts; (3) that by reason of such levy, the court acquired dominion over the rights and interest of the defendant in such account; (4) that a valid levy upon each bank account has been made, pursuant to the provisions of the Civil Practice Act, and still exists; and (5) that such bank accounts constitute an attachable res, not affected by the Executive Order, which merely provides a regulatory plan and operates exclusively in personam upon the banks, and has no further or other legal effect.

Manifestly, the Executive Order has no expropriating effect. Thereunder the funds of the defendant have not been seized. The Order merely restrains their payment or transfer by the banks. It does not prohibit defendant's institution of suit against a bank holding defendant's funds. It does not prevent the assignment of the defendant's claim against such a bank in a way conveying effectually to the assignee the title to the claim.

Upon accepted principles, bank accounts, such as are here involved, are debts due to the appellant which furnish an adequate basis of jurisdiction if seized by legal process. In New York this process contemplates service of a certified copy of the warrant of attachment, which service is "deemed a levy upon, and a seizure of all the rights of the defendant in or to the said debt." Civ. Prac. Act, § 916, subd. 3; Erskine v. Nemours Trading Corp., 239 N. Y. 32, 145 N. E. 273. Such a debt is incapable of manual seizure, and service of the warrant

constitutes a seizure thereof under the doctrine of "constructive seizure." Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Plimpton v. Bigelow, 93 N. Y. 592, 597; Harris v. Balk, 198 U. S. 215, 222, 223, 25 S. Ct. 625, 49 L. Ed. 1023, 3 Ann. Cas. 1084; Security Sav. Bank v. California, 263 U. S. 282, 286, 44 S. Ct. 108, 68 L. Ed. 301, 31 A. L. R. 391; Zuhlke v. Prudential Life Insurance Co., 244 App. Div. 549, 551, 279 N. Y. S. 833.

Adjudicated cases in this State are analogous, and proceed upon the principle underlying our ruling above indicated. Cf. Warner v. Fourth Nat. Bank, 115 N. Y. 251, 257, 258, 22 N. E. 172; Dunlop v. Patterson Fire Insurance Co., 74 N. Y. 145, 30 Am. Rep. 283.

The order appealed from should be affirmed, with $10 costs and disbursements to each respondent. Defendant's time to answer is extended until twenty days from the entry of the order thereon.

Order denying defendant's motion to vacate the warrant of attachment, the levies made thereunder, the order for the service of the summons by publication and the service made pursuant thereto, affirmed, with $10 costs and disbursements to each respondent. Defendant's time to answer is extended until twenty days from the entry of the order thereon.

Date of Termination of Insured Status Under FDIC

The Home Bank and Trust Company of Winchester, Tenn., prior to April 1, 1938, was an insured bank under provisions of the section of the Federal Reserve Act commonly known as the Federal Deposit Insurance Law. By proper procedure this insured status was terminated on March 31, 1938. The bank was closed on August 18, 1938, and its affairs wound up by insolvency proceedings.

At the time the insurance status of the bank terminated the defendants and others were depositors of said bank, having various types of deposits. After the insurance status terminated, the defendants and others continued to do business with said bank making many additional deposits, and many withdrawals, which continued until the bank was closed.

The question to be determined is where additional deposits, or new deposits, were made and withdrawals were had are all

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §536.

withdrawals to be charged against the insured deposit or only such withdrawals as encroach upon the amount of the deposit at the time of the termination of the insured status.

It was held that additions to deposits and withdrawals did not affect the insured deposit unless the balance at any time was less than the deposits at the time of the termination of the insured status. The statute providing that insured deposits in a bank on date of termination of insured status, less all subsequent withdrawals from any deposits, shall continue to be insured for two years but that no additions to any such deposits and no new deposits made after date of termination shall be insured was intended to extend insurance in a limited way after a bank was in a precarious position and thus to give such a bank an opportunity to rehabilitate. Federal Deposit Insurance Corporation v. Winton, United States District Court, E. D. Tennessee, 41 Fed. Supp. 141. In its opinion, the court said:

> The particular portion of Sec. 12B of the Federal Reserve Act that will determine the question is to be found under (i) (1), as follows:
>
> "After the termination of the insured status of any bank under the provisions of this paragraph, the insured deposits of each depositor in the bank on the date of such termination, less all subsequent withdrawals from any deposits of such depositor, shall continue for a period of two years to be insured, and the bank shall continue to pay to the Corporation assessments as in the case of an insured bank during such period. No additions to any such deposits and no new deposits in such bank made after the date of such termination shall be insured by the Corporation, and the bank shall not advertise or hold itself out as having insured deposits unless in the same connection it shall also state with equal prominence that such additions to deposits and new deposits made after such date are not so insured."
>
> The plaintiff insists that the words "any deposits" appearing in the first sentence above quoted intends and includes deposits at the time of the termination of the insured status and deposits made after the termination of this status. The defendants insist that this term "any deposits" refers to deposits at the time of the termination of the insured status with no reference to any deposits made thereafter.
>
> Attention is called to the fact that the word "deposits" does not appear in the lengthy paragraph of said subsection (i) (1), except in the sentences quoted. Therefore, when the words "such deposits" appear in the second sentence above quoted the word "such" refers to

some preceding announcement of the same type or character of deposit either expressly or contextually. It plainly appears that there is no contextual inference to which the word "such" could refer. The result is that the words "such deposits" must necessarily refer to the words "any deposits" or the words "insured deposits" as appears in the preceding sentence.

It is noted that the beginning of the second sentence is "No additions to any such deposits . . .", which would eliminate the idea that the words "such deposits" could refer to the words "insured deposits" for the reason that there can be no additions to insured deposits. Insured deposits are fixed by operation of the law and the depositor cannot add to or take from by his action. A depositor may increase his deposit and by operation of law increase his insured deposit but when the maximum of insured deposits is reached, there can be no addition thereto by other deposits.

It necessarily results that the words "such deposits" refer back to the words "any deposits" which would mean that the words "any deposits" and the words "such deposits" mean one and the same thing.

The words "any deposits," therefore, could not include all deposits until the bank failed for the reason that it would thereby be impossible to make additions thereto.

Therefore, the words "No additions to any such deposits" necessarily mean that there can be no additions to the deposits on hand at the time of the termination of the insured status which will be insured. Thus "such deposits" would be the deposits as they were at the time of the termination of the insured status.

Then the inevitable conclusion is that the words "and deposits" mean the deposits as they stood at the time of the termination of the insured status.

The word "any" in this connection is evidently put in as a matter of precaution just as it was put in in that part of the second sentence where it says "any" such deposits. The word "deposits" as defined in the Act includes all character and types of deposits and it is the judgment of the court that the word "any" was added to keep down confusion where a depositor might make withdrawals from only one type of deposit and claim insurance on the other type.

This construction of this particular portion of the Act seems to be in full accord with the intention and spirit of the whole section of this Act. It has been said that this chapter was intended to prevent runs on banks by depositors, to preserve solvency of insured banks, and thus to keep open the channels of trade and the commercial exchange.

The particular portion of the section under consideration here is evidently intended to extend the insurance in a limited way after a

bank was in a precarious condition and thus to give such bank an opportunity to rehabilitate.

If it should be the law that withdrawals from new business in a bank would be charged against the insured deposit of a depositor, there would be little probability of new business.

The strong probability is that there would be a run on a bank and a change by the depositors to an insured bank. Whereas, if there is an insurance upon the amount the depositor has in the bank at the time of the termination of the insured status for a period of two years and only such withdrawals from this deposit to be charged against the insured deposit, there is some chance for a bank to persuade its depositors to continue business. Thus, it would appear that if the plaintiff's contention is a proper construction of this law, the very purpose of this whole section would be largely defeated.

There is also significance to sustain this construction of this portion of the chapter wherein it is provided in the second sentence above quoted that the bank shall not advertise that it has insured deposits unless it states with equal prominence that there is no insurance on additions to deposits and new deposits made after such date. If it had been intended that a withdrawal from all new business would be charged against the insured deposit, it would seem that the Congress would have provided that the public be also advised of this important situation.

Another question that might bring up differences of opinion is where a depositor makes additions to a deposit, whether it be a checking account, a savings account, or a certificate of deposit, as to whether there can be an identification of the insured deposit.

It appears from a review of this whole section of the Act that the insurance is not intended to be a protection upon a particular fund but is an insurance for protection of a set amount of money. Therefore, the situation is not analogous to the identification of a trust fund but is more like the doctrine of "shifting risk" in fire insurance law.

Therefore, it is the judgment of the court that additions to deposits and withdrawals would not affect the insured deposit unless the balance at any time was less than the deposits at the time of the termination of the insured status.

It is the idea of this court that the intention of this portion of the chapter was to limit the insurance in this particular: All withdrawals from any deposit on hand at the time of the termination of the insured status is to be charged against the insured deposit, whereas, while the insured status was in effect the withdrawals from any deposit was not chargeable against the insured status but charged against the deposit. Whether this would affect the insured deposit would depend upon the amount upon deposit. Also, that no additions to any such deposit and no new deposits would have insurance.

Under this section of the Act a bank is required to keep up its assessments and be subject to the law just the same as when the insured status did exist. The result is a limited amount of insurance which would tend to benefit the bank, the Corporation, and the public.

The court's conclusions are:

(1) There is no insurance on additions to deposits that were in the bank at the time the insurance status terminated. There is no insurance on new deposits.

(2) The amount of insurance due any depositor at the time the bank closed who made additions to the deposits he had at the time the insurance status terminated should be estimated by an examination of his account. If it should appear at any time or times within said period that his balance was less than the amount he had at the time the insurance status terminated, the difference must be charged against the insured deposit. The type or character of his deposit is not material for consideration.

Only withdrawals that encroach upon the amount of his deposit at the time the insurance status terminated are to be charged against his insured deposit.

If the depositor's amount of deposit remains as much or more than it was at the time the insurance status terminated, then his insured deposit is not affected.

All facts having been agreed to by stipulations, it is unnecessary for the court to make a finding of fact and the conclusions of law are as stated in this opinion.

Let a judgment be prepared in accord herewith.

On Motion for New Trial.

The plaintiff has presented a motion for new trial and very seriously contends that its claims are meritorious.

After carefully reading the briefs and again giving diligent study to the portion of the Act in question, and its history, I find no reason to change my former opinion.

There are one or two ideas suggested by the arguments and briefs that will be considered.

From a history of the legislation it seems that there was some concern about what could be done with State member banks if it became necessary to terminate the insured status. This came about by the situation wherein it was provided that national member banks could be closed under such conditions but that there would be no federal authority to close a State member bank.

It would seem that it was desired to protect the Corporation where it was necessary to terminate the insured status of a State member bank in the same manner as if it were a national member bank.

The construction the court has placed upon the portion of the Act

involved gets this result. In fact it gets better results in that the Corporation is benefited for the reason that withdrawals from any deposit on hand are charged against the insured deposit after the termination of the insured status of a State member bank.

If the insured status is withdrawn from a national member bank and it is closed by the appointment of a receiver the status of the insured deposits is of the date of the withdrawal and of the closing of the bank. Likewise, the status of the insurance on deposits in a State member bank is fixed as of the date of the termination of the insured status. No new business affects this status and it is only affected, favorable to the Corporation, by withdrawals from deposits that were on hand when the insured status terminated.

This seems to me to be the plain intention of the Act and fully disclosed in the hearings before the committees in the Congress.

It is argued that there was no thought of Congress to aid State member banks to rehabilitate after the termination of the insured status. Such may be true but would not affect the questions in this case. But I am unable to see why there isn't some merit in this idea for the reason that the Congress could have provided, by fair and equitable provisions, that the deposit insurance would be entirely withdrawn from State member banks under certain conditions.

I feel fully satisfied with the conclusions reached in the original opinion and overrule the motion for a new trial.

Bank Not Liable in Action for Negligence

A petition by a surety on the bond of a guardian alleging generally that bank was negligent and careless in permitting guardian to deposit check in his personal account and to thereafter draw funds therefrom did not state a cause of action for negligence. United States Fidelity & Guaranty Co. v. Mississippi Valley Trust Co., St. Louis Court of Appeals, Missouri, 153 S. W. Rep. (2d) 752.

In this case the Probate Court of the City of St. Louis, Missouri, appointed a guardian for two minors. The guardian filed a bond for the faithful discharge of his duties according to law. This bond was signed by a bonding company as surety. Thereafter an agreement was entered into between the guardian and the surety whereby the guardianship money

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §419.

was to be deposited in a certain bank and to be under the joint control of guardian and surety. The bank had knowledge of this agreement.

Some time later a check, representing the proceeds of a certain insurance policy in the amount of $10,268.37 and payable to the guardian in his official capacity, was deposited by the guardian in his personal checking account which he had with the bank named in the joint control agreement. Thereupon the guardian proceeded to unlawfully convert said funds of the guardianship estate to his own use.

A proceeding was then instituted by the successor guardian of the minors against the bonding company as surety on the guardianship bond whereby a judgment was entered against the bonding company, causing it to suffer a loss of $4,484.31 the amount found to have been owing and unaccounted for from the guardian. Thereafter the bonding company sued the bank for this money, alleging that the loss was made possible through the bank's negligence in permitting the guardian to convert the money by clearing the guardianship check through his personal account.

It was held that the bank was not liable to the bonding company for the loss of the guardianship money. In its opinion, the court said:

> The check described in the petition and which was deposited in the Trust Company to the guardian's individual account was a negotiable instrument; the Trust Company did not profit in the least by the deposit being made to the guardian individually rather than as guardian; it is not even suggested that it received any benefits whatever as a result of the guardian's diversion of the funds; there is no charge of any knowledge on the part of the Trust Company of any misappropriation or diversion of the funds by the guardian either at the time he took credit in his individual account for the proceeds of the deposited check or at the time he drew checks against his account; none of Carpenter's checks were payable to the Trust Company; and there is no charge of bad faith on the part of the Trust Company. The most that could be said is that the Trust Company knew that Carpenter had an agreement with plaintiff (his surety) that it would have joint control with him under his guardianship account and that funds coming into Carpenter's hands as guardian were to be deposited in the joint control account and that withdrawals required the signature of one of plain-

tiff's agents, and that the Trust Company had agreed to this arrangement. But it must be borne in mind that this is not a suit for breach of contract. Plaintiff having abandoned any right to recover on an express contract, he must stand or fall on a contract implied by law and for a consideration received, and there is no claim that the Trust Company received any consideration whatever.

It has been held by an abundance of authorities, some of which will be referred to later, that such suit as is attempted to be prosecuted here must have as a basis bad faith on the part of the bank or trust company and actual knowledge that the guardian was diverting the trust funds, and no such charges appear in this petition. Any other rule would permit this surety, who signed this guardian's bond for a consideration, which it still retains, to escape all liability for the guardian's defalcations, and the Trust Company which received nothing from the transaction would be saddled with full responsibility. It must be conceded that in some three or four states it has been so held, but the great weight of authority is to the contrary.

We are cited by plaintiff to the case of Lloyds Ins. Co. of America v. Moberly, 231 Mo. App. 920, 82 S. W. 2d 139, 144, a decision by this Court, but that case is clearly distinguished from this case, in that it was an action for breach of an express contract, the opinion stating, "We have examined the record and find that the petition of the plaintiff surety company clearly stated a cause of action based upon the violation by the defendant bank of the joint control agreement referred to."

While as above stated we find from other jurisdictions some authority to support plaintiff's views we think that not only the great weight of authority but the better considered cases and texts is to the effect that it is not deemed a breach of trust, or such a suspicious circumstance as to cast upon a bank or trust company the duty to investigate, where a trustee carries trust funds in his personal account, and this even though the fact is known to the bank or trust company. Such practice on the part of administrators, executors, guardians or trustees, all to frequently indulged in, should be not only discouraged but condemned. But where it is done the bank or trust company has a right to believe that the trustee is acting with an honest purpose and that he will check against the trust credit in his account for proper trust purposes. Any other rule would place a burden on the bank or trust company for which it receives no remuneration and would so complicate the handling of commercial paper that no bank or trust company could safely transact a banking business with any but individuals in their own right.

4 Bogert on Trusts & Trustees, § 908, p. 2632, has this to say: "While, as shown previously, it is bad practice for a trustee to carry trust credit in his personal bank account, and, if the bank fails, the trustee will be a guarantor of the safety of funds so held, it is not

deemed by the courts a breach of trust or such a suspicious circumstance as to put a duty on the bank to investigate. The courts feel that the bank is entitled to believe that the trustee will check the trust credit out of the personal account for trust purposes, and that he is merely guilty of careless or unbusinesslike methods of handling the trust property and not of dishonest practices. It is the judicial opinion also that to require the bank to investigate such a transaction would put a burden on the bank for which it is not paid by the trust, and would clog the handling of commercial paper in a way which would be a disadvantage to the business community."

The American Law Institute, Restatement of the Law of Trusts, § 324d, pp. 966, 967, states the law as follows:

"Deposit in personal account. Although the bank knows that the funds deposited are trust funds, and the deposit is made in the name of the trustee personally, the bank is not bound to make inquiry whether the trustee is committing a breach of trust in making the deposit; and although the deposit is made in a breach of trust, the bank in receiving the deposit is not liable for participation in the breach of trust, in the absence of further circumstances known to the bank indicating that the trustee is committing a breach of trust.

"Thus, if a trustee indorses a check payable to him as trustee and deposits it in a bank to the credit of his personal account, the bank is not bound to make inquiry whether the trustee is committing a breach of trust in making the deposit; and although the trustee in fact commits a breach of trust in making the deposit, the bank is not liable for participation in the breach of trust in the absence of further circumstances known to the bank indicating that the trustee is committing a breach of trust.

"Similarly, if a trustee draws and deposits in a bank to the credit of his personal account a check drawn by him as trustee upon an account in the same or another bank in his name as trustee, payable to himself personally or to the bank in which he deposits it, the bank of deposit is not bound to make inquiry whether the trustee is committing a breach of trust in making the deposit; and although the trustee in fact commits a breach of trust in making the deposit, the bank is not liable for participation in the breach of trust in the absence of further circumstances known to the bank indicating that the trustee is committing a breach of trust."

26 R. C. L. § 174, p. 1316, citing cases from various states to support the text, states the law as follows: "The presumption is that a trustee will faithfully administer his trust and not misappropriate funds committed to his care, and so if moneys are deposited by one as trustee, he, as such trustee, has a right to withdraw them, and the bank, in the absence of notice to the contrary, is bound to assume, and

is protected in assuming, that the trustee will appropriate the moneys, when drawn, to the proper use; and this is true whether the checks are signed by him in his representative capacity or not. But if a bank in which moneys are deposited in the name of a trustee as such has knowledge that a breach of his trust is being committed by the improper withdrawal of such funds, or if it participates in the profits or fruits of any fraud on the trust, it is answerable. The mere fact, however, that a bank knows that moneys deposited with it have by a depositor been acquired in a fiduciary capacity does not impose on it the duty, or give it the right, to institute an inquiry into the conduct of its customer in order to protect those for whom he may hold the fund, but between whom and the bank there is no privity."

We are not without substantial authority from our own courts. In the case of McCullam v. Third National Bank, 209 Mo. App. 266, 237 S. W. 1051, 1056, this Court in an exhaustive review of the law as declared by courts of other states, and as declared by our Supreme Court in the case of Gate City Bldg. & Loan Ass'n v. National Bank of Commerce, 126 Mo. 82, 28 S. W. 633, 47 Am. St. Rep. 633, 27 L. R. A. 401, clearly states the law as follows:

"In the case of Gate City Bldg. & Loan Ass'n v. National Bank of Commerce, 126 Mo. 82, 28 S. W. 633, 47 Am. St. Rep. 633, 27 L. R. A. 401, we have a decision of our Supreme Court which we think controls. The secretary of the building and loan association received $4,000 by way of a check from a customer, payable to the association. The secretary, Harris, indorsed the check and deposited it to his personal account in the Bank of Commerce. The bank credited his account, collected the check from the clearing house, and thereafter Harris drew out the money on his personal checks, embezzled the money, and absconded. The loan association made demand on the bank for the return of the money, and sued for its recovery in an action for money had and received. There the court said:

" 'The law of the case seems to be within a narrow compass. There is not a particle of evidence tending to prove that the bank did not act in perfect good faith in this transaction, in respect of which it occupied no fiduciary relation to plaintiff. It does not appear from the evidence to what purpose the proceeds of the check were ultimately applied by Harris—it may have been to his own or to those of the association—nor is this a matter of any importance upon the present issue. The bank was not responsible for the proper application of those proceeds by him. R. S. 1889, § 8691. The check was a negotiable instrument. Famous, etc., Co. v. Crosswhite, 124 Mo. 34 [27 S. W. 397, 26 L. R. A. 568, 46 Am. St. Rep. 424]. The credit given to the account of Harris was the same as if the money had been paid him on the check and had been immediately placed back by him and

credited on his own account. Benton v. German American Nat. Bank, 122 Mo. 332 [26 S. W. 975]; Oddie v. [National City] Bank, 45 N. Y. 735 [6 Am. Rep. 160]; 2 Morse on Banks and Banking (3d Ed.) § 451. The bank thereby became a purchaser for value, in the ordinary course of business, of the instrument, and entitled to collect the proceeds thereof to its own account if it acquired plaintiff's title by indorsement. So that the only question is: Did Harris in his official capacity as secretary have power to transfer the check by indorsement? . . . If the association has met with any loss by reason of a misapplication of that fund, it must be charged to a breach of the trust imposed in one of its officers, and the neglect of duty by the others.' "

In the case of New Amsterdam Casualty Co. v. Robertson et al., 129 Or. 663, 278 P. 963, 965, 64 A. L. R. 1396, the cases were reviewed. We quote as follows from that opinion: "We are in accord with the view, as expressed by the great majority of the courts, that if a bank, acting in good faith, merely credits trust funds, knowing them to be such, to the personal account of the fiduciary, it will not be liable if he later misappropriates such funds. Kendall v. Fidelity Trust Co., 230 Mass. 238, 119 N. E. 861; Allen v. Puritan Trust Co., 211 Mass. 409, 97 N. E. 916, L. R. A. 1915C, 518; Goodwin v. American Nat. Bank, 48 Conn. 550; Safe-Deposit & T. Co. v. Diamond Nat. Bank, 194 Pa. 334, 44 A. 1064; Life Ins. Co. of Virginia v. American Nat. Bank, 6 Va. Law Reg. (N. S.) 106; Gray v. Johnston, 16 Weekly Reporter 842, L. R. 3, H. L. 1; Rice v. People's Sav. Bank, 140 Wash. 20, 247 P. 1009; 6 Cal. Law Review 171; 34 Harvard Law Review 454."

It would serve no useful purpose to cite and quote from the many cases that have arisen involving the questions that are presented in this case. Sufficient to say there are some cases from other states, notably Tennessee, Arkansas, Mississippi and Illinois, which hold to the effect that if the depositary has knowledge of a course of dealing with trust funds by the trustee which would lead a person of reasonable prudence and caution to suspect the funds are about to be misappropriated, that a duty is laid upon the depositary to make reasonable inquiry to ascertain the true facts and prevent the diversion. However, we think such cases are contrary to the theory of the law as declared by our courts in the case of McCullam v. Third National Bank, supra, and the case of Gate City Bldg. & Loan Ass'n v. National Bank of Commerce, supra, and are not in accord with the great weight of authority in this country.

As herein above stated, there is no allegation of bad faith on the part of the Trust Company or of knowledge that the guardian was misappropriating or diverting the trust fund, or that the Trust Company received any benefit from the transaction, and absent such elements the Trust Company is not liable.

Drawee Bank May Recover Money Paid on Forged Indorsement

Where a bank cashed a check on forged indorsements without making any effort to verify the indorsements and then indorsed the check and guaranteed all prior indorsements and presented the check to the drawee bank, it was held that the drawee bank crediting the bank cashing check with amount thereof was entitled to recover from bank cashing check. Morris Plan Bank of Fort Worth v. Continental National Bank of Fort Worth, Court of Civil Appeals of Texas, 115 S. W. Rep. (2d) 407.

In this case the Morris Plan Bank in the City of Fort Worth, Texas, was approached by a Mrs. C. W. Doyle, who represented herself to be Mrs. E. B. (Mollie) Holden, and advised the bank that her husband, E. B. Holden, desired to borrow $162. She was furnished with a blank application, to be signed by E. B. Holden. She later returned with the signed application. The bank furnished her with a note filled in for the amount and terms of the loan. She later returned with the note signed in the name of "E. B. Holden," as maker, and "A. K. Freeman" and "J. B. Griffin," as sureties. Actually, Mrs. Doyle had forged the names of the purported signers to the application for the loan and to the note.

E. B. Holden is and had been for some time prior to the transactions, a resident of the City of Fort Worth, and his name and telephone number appeared in the telephone directory. The bank, however, did not call Holden or make any effort to verify either his signature or those of the sureties.

When the note, thus signed, was returned, Morris Plan Bank executed its check on its depository, the First National Bank, for $162, payable to E. B. Holden or order, and placed it with Mrs. Doyle for delivery to E. B. Holden. Mrs. Doyle then forged the indorsement of E. B. Holden and Mollie Holden on the back of the check. She then took the check to Continental National Bank, where she represented herself to

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §564.

be Mrs. Mollie Holden, and received from that bank the cash and surrendered the check. Continental National Bank made no effort to verify the indorsements on the check, although E. B. Holden had formerly kept an account with the bank.

The Continental National Bank indorsed the check and guaranteed all prior indorsements. The check was presented to the First National Bank (the drawee) through the Fort Worth Clearing House, and the last named bank credited Continental National Bank with the amount. Because of the forged indorsements on the check, the First National Bank did not charge the check to Morris Plan Bank's account.

First National Bank then sued Continental National Bank for the amount of the check and the latter bank interpleaded Morris Plan Bank. Continental National Bank asked that it be awarded a judgment over against Morris Plan Bank for any sum recovered by the First National Bank.

In holding that the Morris Plan Bank was not liable to the Continental National Bank, the court said:

> We think the controversy here is determinable from Section 23 of Article 5932, R. C. S., known as the Negotiable Instrument Act. That section reads: "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority."
>
> The expression found in the latter part of the above quoted section of the Negotiable Instrument Act, is an exception from the general rule. It will be noted that the rule above announced shall apply, "unless the party, against whom it is sought to enforce the right, is precluded from setting up the forgery or want of authority." The word "precluded" as used here, means "estopped." Brannon's Negotiable Instrument Law, 4th Ed., page 183. Since it is indisputably true that Continental paid the check on a forged endorsement, it could not hold Morris Plan for its issuance of the check unless the latter was estopped from relying upon the forged endorsement.
>
> Continental says in its brief that it does not charge Morris Plan with negligence in delivering the check to Mrs. Doyle, as it did, but that its negligence in the matter was the manner in which it enabled Mrs. Doyle to commit the forgery. It is our view that the incidents in

connection with accepting by Morris Plan from Mrs. Doyle of the forged note upon which it relied when the check was issued and delivered to her, can find no causal connection, nor was it a proximate cause of the Continental paying the check on a forged endorsement. All of the preceding transactions could have been had to the detriment of Morris Plan, and Continental would never have been concerned about it, if Morris Plan had not issued the check payable to the order of Holden and delivered it to Mrs. Doyle for transmission to Holden; yet Continental says it is not complaining of the delivery of the check, but of negligence of Morris Plan in the manner in which it negotiated the transaction with Mrs. Doyle.

In American Sash & Door Co. v. Commerce Trust Co., 332 Mo. 98, 56 S. W. 2d 1034, 1038, by the Supreme Court of Missouri, it was said: "By the overwhelming weight of authority the negligence of a depositor [applicable to Morris Plan in this case] which will relieve the drawee bank from cashing on a forged endorsement his check delivered to one person, but made payable to the order of another, must be such as relates to the forgery or its detection and the payment of the check, not to the mere mistaken issuance thereof. . . . It is not simply a question of using due care [by the paying bank] and of offsetting negligence against contributory negligence." The opinion holds that to be a defense against payment on a forged endorsement, the negligence of the drawer must be of such a nature as to interfere with the paying bank's performance of its contract, and being in effect a representation by the drawer which amounts to an estoppel. It is pointed out that even the negligent delivery of the check to a person other than the payee is not the proximate cause of the loss sustained by the bank on which it is drawn, when paid on a forged endorsement. It is said there are two intervening causes of the loss. First, the forgery by the wrongdoer, and second, the negligence of the bank in cashing the check when not endorsed by the payee. Decisions are cited in support of the rule, from many jurisdictions where Section 23 of our Article 5932, supra, was involved.

It is elemental that if a bank pays a check to one other than the actual payee or to his order, or is mistaken as to the payee's identity or is paid upon a forged endorsement of payee, the bank is responsible. Daniel On Negotiable Instruments, 6th Ed., section 1618.

It may be conceded that Morris Plan Bank was ever so careless in promising to Mrs. Doyle a loan to Holden, yet that negligence was only remotely connected with the payment by Continental of the check to Mrs. Doyle on the forged endorsement of Holden. Let us suppose that Mrs. Doyle was in fact instructed by Holden to ascertain if he could get the loan from Morris Plan, and the bank had assented and told Mrs. Doyle to get the note signed by Holden, and that she went out and forged Holden's name to the note, in exchange for which the

bank delivered its check to her, payable to Holden or order, and she had then forged the endorsement of Holden and cashed the check at Continental; in such circumstances the last mentioned bank could not recover against the drawing bank for its payment.

To illustrate: If A should be guilty of negligence at some time prior to an act complained of by B, that negligence would not necessarily render A liable to B unless there was a causal connection between the negligent act and the act of which B complains. A's negligent act must have been the proximate cause of the damages before B can recover. Morris Plan took the forged note from Mrs. Doyle under the erroneous belief that it was accepting the obligation of Holden, and if it had paid to Mrs. Doyle the cash in exchange for the note it would have suffered the loss, but under the facts before us, it took the precaution to deliver to Mrs. Doyle a check, payable to Holden or order, for delivery to Holden. By the terms of the check, Morris Plan knew that no one but Holden or another upon his order could lawfully receive the money. If Continental had faithfully observed the terms of the check it would have suffered no loss.

In the stipulation of facts, after reciting the transactions leading up to the issuance and delivery of the check by Morris Plan to Mrs. Doyle, it is said: "The check having been placed with Mrs. C. W. Doyle for delivery to E. B. Holden as a part of the loan transaction, she then proceeded to forge the endorsement of E. B. Holden and Mollie Holden on the back of the check." We fail to see how Continental's duties and responsibilities to pay only to Holden or his order would have been changed, if Morris Plan had taken a forged note from Mrs. Doyle, one upon which it could never collect, and then issue its check payable to Holden or order and deliver it to Mrs. Doyle "for delivery to E. B. Holden." Irrespective of the nature of the transaction had between the Morris Plan and Mrs. Doyle, it was the imperative duty of Continental, before paying it, to see that it was paid either to Holden, the payee, or his order. The vice in the transaction is that Continental paid the check on the forged order or endorsement of Holden.

Many of the cases cited by both parties to this appeal involve transactions between banks and parties where the names of fictitious persons were used. Others involve transactions where one party assumed to act under some name other than his own and the name used may or may not have been a fictitious person. The points discussed there are not in this case and it is needless to enumerate them. In this case Morris Plan knew it was not dealing with E. B. Holden because the applicant was a woman, who represented herself to be Holden's wife. The check being payable to E. B. Holden or order, the drawer was safe in assuming that even though it was delivered to Mrs. Doyle, whom it thought was Mrs. Holden, the check would have

to be endorsed by Holden or by some one authorized to so endorse it. The Continental was in duty bound to see that this was done, before it would be justified in cashing it. E. B. Holden had at one time been a customer of Continental and aside from this, that bank was in as good position as any other bank to satisfy itself that the endorsement was genuine.

The judgment of the trial court awarding recovery to First National Bank against Continental National Bank was correct (Fidelity & Deposit Co. of Maryland v. Fort Worth National Bank, Tex. Com. App., 65 S. W. 2d 276), and to this extent the judgment is left undisturbed. In so far as the judgment entered was in favor of Continental National Bank against Morris Plan Bank, the judgment of the trial court is reversed and judgment is here rendered in favor of Morris Plan Bank.

Reversed and rendered in part and left undisturbed in part.

BANKING DECISIONS

In this department are published each month all of the important decisions of the Federal and State Courts, involving questions pertaining to the law of banking and negotiable instruments.

LIABILITY OF CO-MAKERS UNDER SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

Modern Industrial Bank v. Zaentz, Municipal Court of City of New York, 29 N. Y. Supp. (2d) 969

Co-makers who executed note without receiving value and for sole purpose of lending credit to maker, could not invoke the benefits of the provision of Soldiers' and Sailors' Civil Relief Act, authorizing court in its discretion to stay an action against sureties, guarantors, indorsers, and others subject to the obligation or liability, where it did not appear that similar relief had already been extended in favor of the maker on the ground of military service.

In this case the records did not disclose whether maker, who was in military service had been served with process in the action brought on the note against the maker and co-makers, so as to render maker a party defendant; nor did the records disclose whether action had been stayed as against the maker. It was held that there was no basis for the exercise or denial of discretion in favor of co-makers, not in military service, under the provision of the Soldiers' and Sailors' Civil Relief Act authorizing plaintiff by leave of court to proceed against other defendants even though a person of military service is a co-defendant in the action.

Action by the Modern Industrial Bank against Bernard Zaentz, Cy Resnick and Hyman Leiter, to recover the balance due on a promissory note, wherein the two last-named defendants moved for stay of further prosecution of the action during the period of military service of first-named defendant.

Motion denied with leave to renew.

Samuel L. Marcus, of New York City, and Samuel Opperman, of Brooklyn, for plaintiff.

Michael Leiter, of New York City, for defendants Resnick and Leiter.

WECHT, J.—On or about August 11, 1940, the defendant Zaentz applied for and secured a loan from the plaintiff in the sum of $200, to be repaid in weekly payments, for a so-called investment certificate. The loan was evidenced by a note executed by the defendants Resnick and Leiter, as well as by Zaentz, and was secured by the investment certificate executed by Zaentz only. Under the terms of the note "12 months after date the undersigned

Borrower	Bernard Zaentz	L.S.
Co-Maker	Cy Resnick	L.S.
Co-Maker	Hyman Leiter	L.S.

for value received, jointly and severally promise to pay to the order of Modern Industrial Bank, $200.00."

Payments for the investment certificate were made totalling $48 up to November 25, 1940, at about which time Zaentz was inducted into the military service of the United States. Induction was followed by nonpayment. The plaintiff now seeks to recover $154, representing the balance due under the note, after applying the payments on the investment certificate, in addition to a delinquency fine of $2, imposed pursuant to the Banking Law.

Resnick and Leiter set up a defense, inter alia, that Zaentz is presently in the military service. They now move to stay the further prosecution of the action during the period of military service of Zaentz, and for a period of sixty days thereafter. Reliance is placed upon the Soldiers' and Sailors' Civil Relief Act of 1940 (Ch. 888, 3rd Session, Public No. 861, 76th Cong., S. 4270, 50 U. S. C. A. Appendix § 501 et seq.) and the corresponding sections of parallel state legislation. Ch. 686, Laws of 1941.

Two questions are raised by the instant motion: (1) Are Resnick and Leiter within the class of persons protected by the law? and (2) Assuming they are within this classification, has there been compliance with statutory conditions precedent to the exercise of judicial discretion created by the law?

First, Section 103(1) of the Federal Act provides: "Sec. 103. [§ 513.] (1) Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended such stay, postponement, or suspension may, in the discretion of the court, likewise be granted to sureties, guarantors, endorsers, and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended." 50 U. S. C. A. Appendix § 513(1).

Plaintiff in resisting the stay urges that Resnick and Leiter as ac-

commodation makers are primary, not secondary, obligors under the Negotiable Instruments Law, and that the moratory privileges of Section 103(1) are applicable to secondary obligors only. Reference is made to National Citizens' Bank of City of New York v. Toplitz, 81 App. Div. 593, 81 N. Y. S. 422, in support of plaintiff's contention under the Negotiable Instruments Law. It may be pointed out, however, that when that case was appealed to the Court of Appeals (178 N. Y. 464, 466, 71 N. E. 1) the nature of the liability of an accommodation maker was specifically adverted to and left unanswered. Fundamentally, however, the present action is between the immediate parties. Negotiability is not involved. The definitions of the Negotiable Instruments Law are, therefore, inapplicable.

Section 103 (1) in itself makes no distinction between primary and secondary obligors. Stays may be granted to "sureties, guarantors, endorsers, and others subject to the obligation." The distinction between primary and secondary liabilities refers only to the remedy provided by law for enforcing the obligation, rather than to the character and limits of the obligation itself. Winkle v. Scott, 8 Cir., 99 F. 2d 299, 303. But aside from this, Resnick and Leiter, having incurred an obligation for the benefit of Zaentz, without participating in the consideration, stand in the position of sureties, regardless of how they are denominated in the instrument they have executed. Howell v. War Finance Corporation, 9 Cir., 71 F. 2d 237, 243. The statute itself refers to both types of obligors, primary as well as secondary. It is well settled that guarantors and endorsers are subject to a secondary liability, but that of sureties is primary. Massell v. Prudential Insurance Co. of America, 57 Ga. App. 460, 196 S. E. 115. Nor is the plaintiff aided by the denomination of Resnick and Leiter as co-makers in the note. Assuming they are thereby excluded from the immunities of "sureties, guarantors, and endorsers," they would still be among the "others subject to the obligation or liability" enprivileged by the Act to seek the protection of a stay. That phrase, used in connection with the words preceding it, is broad enough to include all persons besides sureties, guarantors, or endorsers who are not borrowers, but who are nevertheless obliged to pay the debt depending upon a future event which may not occur, namely, the default of the borrower. Finally, when the very note involved in the action requires "the undersigned shall . . . provide such additional co-makers, guarantors or sureties as shall be satisfactory to the holder . . . that the holder thereof may accept other co-makers, guarantors, sureties . . . ," the argument that differentiates between primary and secondary liability loses force when used as a basis for denying the stay.

These conclusions are not weakened by Section 101(3), which defines "persons," in respect of any right against a person in military

service or a person "secondarily liable." For one thing, the section in question does not employ the word "persons"; for another, the Act refers to various types of liability, other than those arising upon written instruments for the payment of money. "Legal proceedings and transactions" are covered. Section 100. The phrase "secondarily liable" cannot therefore be restricted according to the definitions of the Negotiable Instruments Law.

Secondly, the final part of Section 103 (1) qualifies the provision for stay of a proceeding by the words "the performance or enforcement of which is stayed, postponed, or suspended." This suggests that before Resnick and Leiter can secure a stay, it must first appear that a stay is already operative in favor of the obligor in military service. Further support for this conclusion appears from the general tenor of the Act. Thus, provisions for a stay are created in favor of persons in the military service (Section 100) which does not affect their ability to defend. Section 201. "Such stay . . . may . . . likewise be granted to sureties, guarantors, endorsers, and others subject to the obligation . . . the performance or enforcement of which is stayed." Section 103 (1). Were this not so, the Act would present the anomaly of a stay in favor of one obligated to pay on default of the borrower, while the principal debtor in military service is harassed by legal process. The courts will shun reasoning that leads to such a conclusion. It follows that no stay can be granted to Resnick and Leiter, until it is shown that Zaentz has already received a stay. The papers now before the court are silent on this point.

By joining all three, Resnick, Leiter and Zaentz, in the action, the plaintiff has brought itself within the ambit of section 204, that provides inter alia that "Where the person in military service is a co-defendant with others the plaintiff may nevertheless by leave of court proceed against the others."

But the papers before the court on the present motion are likewise silent as to whether Zaentz has been served with process in this action. Until he is served, he is not a party defendant. Bennett v. Bird, 237 App. Div. 542, 261 N. Y. S. 540. The Court is therefore unable to say whether Zaentz is a defendant in this action or the recipient of a stay under this or any other section of the Act. There is, therefore, no basis either for the exercise or denial of discretion in favor of Resnick and Leiter on the present application.

The authorities in other jurisdictions are not controlling here. In Akron Auto Finance Co. v. Frank Stonebraker, Sr., 66 Ohio App. 507, 35 N. E. 2d 585, decided February 21, 1941, the granting of a stay was affirmed. In Morris Plan Bank of Washington v. Waldman et al., Dist. of Columbia Municipal Court, decided May 7, 1941, a stay was likewise

granted. For the reasons hereinbefore stated, this Court comes to a different conclusion.

Although the decision on this motion renders it obiter, a reference to the fine of $2, the plaintiff seeks to impose because of the nonpayment, may be helpful. Here it appears that the fine was caused by the nonpayment and in turn by the absence for military service on the part of Zaentz. The court may then relieve him of the fine. Section 202.

The motion for a stay must be denied with leave to renew.

NEGOTIABILITY OF TRADE ACCEPTANCE

State Trading Corporation v. Jordan, Superior Court of Pennsylvania, 22 Atl. Rep. (2d) 30

A trade acceptance contained the following notation: "The obligation of the acceptor hereof arises out of the purchase of goods from the drawer, maturity being in conformity with the original terms of purchase." It was held that the notation did not render the trade acceptance non-negotiable.

Action in assumpsit by the State Trading Corporation against Harry J. Jordan, Jr., to recover against the defendant as the acceptor of a trade acceptance, wherein the defendant filed an affidavit of defense raising questions of law. Judgment for defendant, and the plaintiff appeals.

Judgment reversed and leave granted defendant to file a supplemental affidavit of defense.

Theodore A. Tenor, of Beaver Falls, for appellant.

Stewart P. McConnel and Wm. A. McConnel & Sons, all of Beaver, for appellee.

CUNNINGHAM, J.—This is an action in assumpsit by the indorsee holder of a trade acceptance against the acceptor. Defendant, Harry J. Jordan, Jr., filed an affidavit of defense raising questions of law which were decided in his favor by the court below. Thereafter judgment was entered for defendant when plaintiff declined to avail itself of the opportunity afforded it "to amend its statement of claim so as to set forth the entire contractual relations, if any, existing by and between" the drawer payee and the defendant acceptor.

Plaintiff relied upon the following averments as constituting its

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NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §1549.

cause of action. On May 23, 1938, defendant accepted for payment a trade acceptance drawn upon him by Fotolabs, Inc., which read:

"No. May 23, 1938
Trade Beaver, Pa.
Acceptance To Harry J. Jordan, Jr.

On September 7, 1938 Pay to the order of Fotolabs, Inc.
One hundred ninety eight and 72/100.....Dollars ($198.72)
Accepted at Beaver, Pa. on May 23, 1938
Payable at Beaver Trust Co.
City Beaver State Pa.
Firm
By Harry J. Jordan, Jr.

Fotolabs, Inc.
By B. J. Zeeman
Treas.

The obligation of the acceptor hereof arises out of the purchase of goods from the drawer, maturity being in conformity with the original terms of purchase.

Endorsed:
Fotolabs, Inc.
By
B. J. Zeeman Treas.
For Collection
State Trading Corporation.

Pay To The Order Of
Any Bank Banker or Trust Co.
All prior Endorsements Guaranteed
Jun 22 1938
The Chase National Bank
of the City of New York
1-74 W H Moorhead, VP & Cashier
Endorsement Cancelled
July 10 1938
Chase National Bank
No. 32
Pay to the order of
Any Bank Banker or Trust Co.
All prior Endorsements Guaranteed
Aug 30 1938
The Chase National Bank
of the City of New York
1-74 W H Moorhead, VP & Cashier
Endorsement Canceled
Sept 8 1938
Chase National Bank."

On June 10, 1938, prior to the maturity of the instrument, Fotolabs, Inc., indorsed it to plaintiff, in good faith for value and without notice of any defenses thereto. When the trade acceptance was presented at its maturity for payment at the bank named therein, the defendant refused payment.

The court below sustained defendant's contention that the statement of claim was insufficient in law on the ground that the Fotolabs, Inc., and defendant. Its conclusion that the trade acceptance was not a negotiable instrument was based upon the words appearing thereon which read: "The obligation of the acceptor hereof arises out of the purchase of goods from the drawer, maturity being in conformity with the original terms of purchase."

Plaintiff contends this notation does not render the promise to pay conditional, that it is merely a statement of the transaction which gave rise to the instrument, not impairing its negotiability.

On the other hand, defendant insists that this notation qualifies the trade acceptance and destroys its negotiability. He also contends that even if it were negotiable, the judgment in his favor should be sustained, because the trial court, in the exercise of its discretion, was justified in directing plaintiff to plead further particulars by attaching a full copy of the contract, or suffer judgment in favor of defendant.

But scant consideration need be given the proposition that the action of the court below should be sustained as being within its discretion, regardless of the negotiability of the trade acceptance. If the notation does not affect its negotiability, the statement of claim clearly sets forth a prima facie case and is not lacking in particulars. If negotiable, the trade acceptance was self-sufficient, and no obligation rested upon plaintiff to aver the transaction giving rise to it. Conversely, if the notation rendered the trade acceptance nonnegotiable, plaintiff would be bound to plead the original terms of purchase, or, if in writing, attach a copy of the agreement pursuant to the provisions of Section 5 of the Practice Act of May 14, 1915, P. L. 483, 12 P. S. § 386. In other words, if the effect of the notation is to incorporate, by reference, the terms of the original purchase, thereby constituting them a condition of the obligation to pay, the instrument would be nonnegotiable. Under such circumstances, plaintiff would be required to plead the entire contract. Consequently, the sole question here involved is whether the trade acceptance was negotiable.

We have had two cases in this court in each of which the action below was based upon a trade acceptance. In one, Traders' Securities Company v. Kalil, 107 Pa. Super. 215, 162 A. 499, 500, the instrument bore a notation reading: "The obligation of the acceptor hereof arises out of the purchase of goods from the drawer." It was contended by the defendant that the promise was not "an unconditional promise to pay" and the instrument was therefore not negotiable. Citing Section 3 of the Uniform Negotiable Instruments Act of May 16 1901, P. L. 194, 56 P. S. § 3, providing, inter alia, that "an unqualified order or promise to pay is unconditional within the meaning of [the] act, though coupled with . . . a statement of the transaction which gives rise to

the instrument," we held, in an opinion by Parker, J. (now Mr. Justice Parker of the Supreme Court), that the placing of that notation upon the trade acceptance did not impair its negotiability in this state. This view represents the overwhelming weight of authority in other jurisdictions. See Brannan's Negotiable Instruments Law, 6th Ed. (1938), p. 158; and Paton's Digest of Legal Opinions, (1940), Vol. 1, p. 50. In the case at bar, therefore, the first part of the notation appearing on the trade acceptance furnishes no support for a finding that it was nonnegotiable. If the court below was correct in holding it nonnegotiable, it could only be by reason of the additional portion of the notation, reading, "maturity being in conformity with the original terms of purchase."

The other case is Levitt v. Johnstown Office Supply Company, 103 Pa. Super. 76, 157 A. 804, in which the opinion was written by Keller, J., now President Judge. In it the notation on the trade acceptance was precisely the same as the notation appearing upon the instrument involved in the case now at bar. It was assumed throughout the trial and upon the appeal that the instrument was negotiable. The action was by the indorsee holder and the trial judge permitted the defendant acceptor to introduce evidence in an attempt to show that the title of the payee who negotiated the instrument to the plaintiff was defective, inter alia, because a promise had been made that the trade acceptance would not be negotiated.

No question having been raised relative to the negotiability of the acceptance, the writer of the opinion treated it as a negotiable instrument, cited a number of cases establishing and defining the rights of indorsees of such instruments, and at page 81 of 103 Pa. Super., at page 806 of 157 A. gave this description of the characteristics of trade acceptances: "A 'trade acceptance' is a recognized term. It is defined in Regulation A of the Federal Reserve Board, section V (a), Aug. 1, 1930, 'as a draft or bill of exchange, drawn by the seller on the purchaser of goods sold, and accepted by such purchaser.' Its purpose is to make the book account liquid and permit the seller to raise money on it before it is due under the terms of sale. When so given in the purchase of goods, as the actual obligation of the acceptor, to attach a parol condition that it shall not be negotiated would not vary, but destroy, its legal effect and negotiability, as much so as an agreement that the acceptor of a bill of exchange or the maker of a promissory note should not be personally liable for its payment. See Fidelity Title & Trust Co. v. Garland et al., 291 Pa. 297, 139 A. 876; First Nat. Bank of Hooversville v. Sagerson et al., supra [283 Pa. 406, 129 A. 333]. Such a condition should be expressed in the instrument itself, or its omission shown to have been procured by fraud, accident, or mistake: Speier v. Michelson, supra [303 Pa. 66, 154 A. 127]. It strikes at the

very heart of negotiable paper, and attempts by a parol condition to transform it into nonnegotiable paper. When given as an actual obligation in the purchase of goods such an allegation does not come within the term used in section 55 of the Negotiable Instruments Law (56 P. S. § 135) 'or when he negotiates it in breach of faith or under such circumstances as amount to a fraud.' Veigil v. Johnson, 163 Minn. 288, 204 N. W. 36."

In view of the fact that the question of negotiability was neither raised nor specifically discussed in the Levitt case, and because of its importance due to the increasing favor with which trade acceptances are now regarded, we shall not dispose of the controlling issue in the present case, viz., whether the placing of the above-quoted notation upon the face of the instrument in suit destroyed its negotiability?

"In recent years a concerted movement to reintroduce the trade acceptance has been made, and its use is strongly advocated by the American Bankers Association, the National Association of Credit Men, and the Chamber of Commerce of the United States." Williston on Negotiable Instruments, 7th Printing (1940), p. 276. This effort to encourage their use is likewise commented upon in Paton's Digest, supra, p. 44.

An examination of the decisions in other states demonstrates a direct conflict of authority upon this important commercial matter in jurisdictions where the courts have had occasion to pass upon the effect of identical phraseology in trade acceptances.

The majority view, and the one adopted by the jurisdictions called upon most recently to determine the question, is that the notation we have in the case at bar does not impair negotiability. The leading case is Heller v. Cuddy, 1927, 172 Minn. 126, 128, 214 N. W. 924, 925, where the court said: "Each of the acceptances contained this statement: 'The obligation of the acceptor hereof arises out of the purchase of goods from the drawer, maturity being in conformity with original terms of purchase.' By reason of Section 7046, G. S. 1923 (Section 3, Negotiable Instruments Law), the promise of a negotiable instrument is not made conditional and its negotiability is not destroyed by 'a statement of the transaction which gives rise to the instrument.' Such a statement is all that was incorporated in these acceptances. So there is no ground for the contention that this statement in the acceptances put the plaintiffs upon inquiry concerning the terms of the underlying contract of purchase or its status at the time being with respect to performance or breach by the parties thereto. The situation is very different from that presented by an instrument which by reference makes another and underlying contract a part of itself and so becomes subject to its terms."

The same view was adopted in State Trading Corp. v. Smaldone, 1938, 172 Misc. 367, 368, 15 N. Y. S. 2d 33.

In State Trading Corp. v. Rosen, 1939, 126 Conn. 37, 9 A. 2d 289, 290, the identical situation was in issue, and the court, in following the view of the Heller case, supra, said: " 'The reference clause is separate and distinct from the rest of the note. . . . There is nothing to show that it was intended to qualify the promise to pay rather than to explain merely the occasion or the circumstances of its execution. Its detachment, both physically and grammatically, from the essential parts of the note, would seem, however, to invite, as more rational, the conjecture that it was merely an explanation of the note as a whole —a memorandum to identify it by connecting its execution with an existing agreement "as per," that is, in accordance with, or pursuant to, which it was made.' Strand Amusement Co. v. Fox, 205 Ala. 183, 185, 87 So. 332, 334, 14 A. L. R. 1121. In the instant case, the time of payment was stated in the instrument, and considering that fact and the position of the clause in question upon the face of the instrument, the language is to be construed as a statement of the transaction which gave rise to the instrument and not as a reference to an extrinsic contract affecting the time of payment. It is as though the clause read 'the maturity stated is in conformity with the original terms of purchase.' The instrument was accordingly negotiable."

Again, in State Trading Corp. v. Toepfert, 1939, 304 Mass. 473, 23 N. E. 2d 1008, the court stated: "The words added to the instrument do not have the effect of incorporating into it by reference any previous written contract between the parties. No writing is mentioned. The 'terms of purchase' may well have rested in parol. Nor does it seem reasonable that the parties who executed in due form a written instrument for the payment of a specified sum of money on a specified day would intend by the added words to alter or destroy the otherwise plain meaning of that instrument by importing into it as controlling conditions the terms of some oral understanding by which and not by the instrument itself the obligations of the parties would be measured. A simple and reasonable explanation of this addition to such an instrument is that it was made in order that the paper might carry on its face an assurance both that it had its origin in a genuine commercial transaction and that there had been no extension of the original term of credit. It has been held in a number of cases in various jurisdictions that a statement that the obligation arose out of the purchase of goods is 'A statement of the transaction which gives rise to the instrument' within the meaning of section 3 of the Negotiable Instruments Law and does not affect negotiability. See cases collected in Brannan, Negotiable Instruments Law (6th Ed.) 158. The addition of the second statement, 'maturity being in conformity with the original terms of purchase,' merely confirms and does not contradict the due date stipulated in the body of the instrument. On its face the accept-

ance became unconditionally due and payable on August 1, 1938. It contains nothing to the contrary by reference or otherwise."

The minority view found expression in three cases: First National Bank v. Power Equipment Co., 1930, 211 Iowa 153, 233 N. W. 103; Lane Co. v. Crum, Tex. Com. App. 1927, 291 S. W. 1084; Westlake Mercantile Finance Corp. v. Merritt, 1928, 204 Cal. 673, 269 P. 620, 61 A. L. R. 811. The Crum case has since been considered as limited in its scope, if not overruled, by Arrington v. Mercantile Protective Bureau, Tex. Com. App. 1930, 24 S. W. 2d 383. See Brannan, supra, p. 158, 159. The Westlake case is not directly in point; the trade acceptance involved contained no specific date of maturity. The ruling in all three cases has been severely criticized in Brannan, supra, p. 158; in 6 Texas Law Rev. 95, 7 Texas Law Rev. 179, 37 Yale L. Journal 382, and 29 Michigan L. Rev. 627. In speaking of the Crum case, the writer said in 6 Texas Law Rev. 95, 98: "The construction given the statement in the principal case by the Commission of Appeals is not that either of the majority of the courts or of the business world. The statement seems to be one commonly found on trade acceptances. The Federal Reserve Board Regulations require a trade acceptance, to be eligible for purchase by a federal reserve bank, to show that it is drawn by the seller on the buyer of goods sold, and to evidence the nature of the underlying transaction. This the recitation does. It indicates that the bill is drawn for merchandise sold, and not for a long outstanding debt or past-due account, and the date of maturity specified in the instrument is as understood by the buyer, the drawee—all circumstances, which, even if known to the holder, do not impair his legal rights, but are significant to a prospective purchaser as to the certainty and ease of collection. Would the business man take it to mean anything more? Few business men would favor a rule requiring them to study said statements with a fine eye for implied conditions."

We are of opinion that the majority view, above indicated, should be adopted in Pennsylvania. The nature and purpose of trade acceptances practically compel this conclusion. Unlike the ordinary promissory note, they can only arise out of contemporaneous commercial transactions. In Paton's Digest, supra, p. 41, they are defined as follows: "A trade acceptance is a draft drawn by the seller of goods upon the buyer for the purchase price of such goods, which draft has been 'accepted' by the buyer. A trade acceptance properly drawn is negotiable paper, and its use results in advantages to both buyer and seller. It is, however, properly used to represent current merchandise transactions only, and is in this respect distinguished from a promissory note, which may be given for a past-due account, borrowed money, or for any other considertaion. Trade acceptances are bills of exchange 'arising out of actual commercial transactions,' which Federal Reserve

banks may discount under Section 2 of Article 13 of the Federal Reserve Act [12 U. S. C. A. § 343] and which they may purchase in the open market under Section 1 of Article 14 [12 U. S. C. A. § 353]."

The principal function of a trade acceptance is to take the place of selling goods on an open account. The mutual advantages to seller and buyer are fully described in Williston on Negotiable Instruments, supra, p. 279:

Our conclusion is that the statement of claim was sufficient in law. The question of law raised by the affidavit of defense, filed January 16, 1939, in lieu of a demurrer, should, therefore, have been decided in favor of the plaintiff.

Judgment reversed and leave granted defendant to file a supplemental affidavit of defense to the averments of fact of the statement within fifteen days after the remission of the record to the court below.

SUSPENSION OF STATUTE OF LIMITATIONS

Bassett v. Christensen, Court of Errors and Appeals of New Jersey, 21 Atl. Rep. (2d) 776

Acknowledgment of debt in order to remove bar of statute of limitations must meet same tests whether made during period when statute of limitations has as yet no application, or after period statute has run, and new promise is deemed to amount to a new contract.

In this case the maker acknowledged the note in a letter sent to the holder of the note. The letter, however, contained no implication of a promise to pay at once or on demand nor of a qualifying condition to be met. The writer specifically held in abeyance any commitment as to what would be done by way of payment. It was held that the letter did not remove the bar of the statute of limitations.

Action by Neal Bassett against Walter J. Christensen on a promissory note. From an order denying plaintiff's motion to strike the answer, plaintiff appeals.

Affirmed.

Frank P. Zimmer, of Newark, for defendont-appellee.

Samuel D. Williams, of Newark, for plaintiff-appellant.

WOLFSKEIL, J.—Appellant is the holder of a note made by respondent, which is dated April 27, 1931, and was made payable on demand. Suit on the note was commenced on September 26, 1940.

NOTE—For similar decisions see Banking Law Journal Digest (Fifth Edition) §1406.

Defendant-respondent pleaded the statute of limitations, R. S. 2:24-1, 2:24-9, N. J. S. A. 2:24-1, 2:24-9. Judgment was entered for the defendant on an order denying plaintiff-appellant's motion to strike the answer, and the appeal is from that order.

None of the facts are in dispute. The issue in substance is whether a letter written by respondent to the appellant before the statutory limitation period had tolled effected a revival of the obligation. The letter was as follows:

"Thursday, June 20, 1935.

"Dear Mr. Bassett:

"My record of the indebtedness to you is as follows: Original loan $2,000 dated June 8, 1929—Interest paid to you $300. New note to Miss Neal is dated from the date of last interest payment—which was April 27, 1931.

"I am sending this to you by mail due to the fact I will not be home on Saturday.

"Mr. Bassett I have an appointment for next week regarding whether or not I can secure a second mortgage on my home, and if so for the amount I can secure. I would like very much to again discuss the subject with you after I have something definite to offer—I will call you by phone and make an appointment at your convenience.

"Looking forward to seeing you again shortly, I am

"Sincerely,

"Walter J. Christensen"

It is settled that a promise to pay will remove the bar of the statute, and an acknowledgment of the debt which creates the implication of such a promise has that result. But if the acknowledgment is coupled with a promise that is qualified or conditional, neither the promise nor acknowledgment will suffice unless the condition has been performed or the event occurs to which the qualifying feature refers. There is also inherent the provision that the promise shall infer payment immediately or on demand when there is no such qualifying condition that has been met. Howell v. Wallace, 10 A. 2d 486, 18 N. J. Misc. 48; Parker v. Butterworth, 46 N. J. L. 244, 50 Am. Rep. 407.

The letter in the instant case is plainly an acknowledgment of the note. But there is no implication of a promise to pay at once or on demand, nor is there the status of a qualifying condition that has been performed. In fact, such a deduction is negatived in the letter, for the writer specifically holds in abeyance any commitment as to what he will do by way of payment.

Appellant urges that the promise to pay immediately or on demand, as herein outlined, is not an essential element of the conclusion to be inferred from the acknowledgment. The settled determination is to the contrary. Appellant also seeks to draw a distinction from the fact that in this instance the acknowledgment was made during the period in which the statute of limitations as yet had no application. This does

not alter the fundamental motivation in the rule. At whatever time an acknowledgment of the debt is made, if the purpose is to depend upon it as a bar to the statute, then the acknowledgment must meet the test imposed to give such a result. In essence, the new promise is deemed to amount to a new contract. If the new promise is qualified or conditional in that phase of it which relates to payment, with the condition unperformed, or if it lacks the element of immediacy or demand, then manifestly it has not attained consummation of expression and obligatory force, and would only do so when the conditions had been met.

The judgment is affirmed with costs.

RENEWAL NOTE WAIVED DEFENSE OF PARTIAL FAILURE OF CONSIDERATION

Ponca City Building & Loan Co. v. Graff, Supreme Court of Oklahoma, 117 Pac. Rep. (2d) 514

Where one giving a renewal note either had knowledge, or by the exercise of ordinary diligence could have discovered, that there was a partial failure of consideration for the original note or false representations by the payee, it becomes his duty to make inquiry and investigate before executing the renewal note, and, if he fails to do so, he is as much bound as if he had actual knowledge.

In this case a building and loan association sought to recover on a renewal note and to foreclose a mortgage. The mortgagors contended that there was a partial failure of consideration for the original note. Evidence established that the mortgagors either had full knowledge of the facts and circumstances surrounding and preceding the execution of the renewal note, or by the exercise of reasonable diligence could have ascertained those facts. It was held that the mortgagors waived the defense of partial failure of consideration by their own action.

Suit by the Ponca City Building & Loan Company against Maude E. Graff and Bennett Graff to recover on a note and to foreclose a mortgage. A default judgment was entered against the defendants, and a sale of the realty was ordered. The plaintiff purchased the realty at the sheriff's sale and went into possession thereof. Thereafter, Maude E. Graff filed a petition to vacate the judgment. A judgment was entered vacating such judgment and ordering all proceedings had thereunder, and the sheriff's sale conveying the realty to the plaintiff, set aside. The plaintiff then filed an amended petition. The defendants

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §352.

answered and filed a cross-petition. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment reversed, and cause remanded, with directions.

Oron S. Ellifrit, of Ponca City, and Eugene Rust and Gavin & Barnes, all of Tulsa, for plaintiff in error.

Bailey E. Bell and Ed Crossland, both of Tulsa, for defendants in error.

ARNOLD, J.—This is an appeal from the district court of Tulsa County.

On the 23rd day of May, 1928, the defendants, Maude E. Graff and Bennett Graff, executed a note in the sum of Eleven Thousand Dollars ($11,000), bearing interest at the rate of 7.8 per cent per annum, in favor of the Ponca City Building and Loan Association. On the same date the defendants executed and delivered to plaintiff a real estate mortgage covering the property involved in this action to secure such promissory note. This was a regular building and loan contract providing for monthly principal payments which were to be used to purchase stock in said company and when there had accumulated a sufficient sum, or $11,000, said stock should be used to cancel and pay said note and mortgage.

On October 3, 1931, a renewal note was executed by the defendants in the sum of Nine Thousand and Fifty Dollars ($9,050); said sum being the balance due after the amount of stock so purchased was applied on the loan. This note provided that said loan should be reduced monthly by the amount of each principal payment made. It also provided an interest rate of 10 per cent. The renewal note, as well as the loan agreement, provided that the mortgage lien above referred to should be continued in full force and effect until the entire indebtedness was paid.

On, or about August 16, 1932, the plaintiff brought suit for the amount due on said renewal note, together with interest thereon at the rate of 10 per cent per annum and the attorney's fee specified in said renewal note and sought to foreclose said mortgage and have the property sold after appraisement thereof; thereafter, on November 10, 1932, default judgment was entered against the defendants, Maude E. Graff and Bennett Graff, in the full amount prayed for, together with a judgment ordering the sale of said property; the plaintiff purchased the property at the sheriff's sale and went into possession thereof, about January 11, 1933.

On June 23, 1933, the defendant, Maude E. Graff, filed a petition to vacate the judgment above referred to; nearly four years thereafter, to-wit, January 21, 1937, a judgment was entered vacating said judgment and ordering all proceedings had thereunder, and the sheriff's sale conveying said property to the plaintiff, set aside. The plaintiff was

granted leave to file an amended petition and caused summons to be issued to the defendants. The journal entry of judgment was not filed until June 21, 1938. On the same day the plaintiff filed its amended petition seeking to foreclose its mortgage. The allegations in the amended petition are the same as were set forth in the original petition, except that in addition thereto it alleges that the plaintiff went into possession of said property on January 11, 1933, and now holds possession thereof as a mortgagee in possession, and that the defendants are entitled to credit for only the net rentals received by the plaintiff in the operation of the property; also plaintiff sought judgment for a straight interest at 10 per cent, as provided in the renewal note, from March 1, 1932, on the balance due on said note. The defendant, Maude E. Graff, answered by way of general denial and in addition thereto alleged full payment by reason of the rents collected by the plaintiff in excess of the total amount due, including interest. The defendant also cross-petitioned for damages for wrongful detention of said property, for rents collected, and for negligent care and mismanagement of the property; and also for the value of the use of defendant's furniture taken by the plaintiff, but not covered by the mortgage. The defendant, Bennett Graff, also answered by way of general denial and cross-petitioned for certain damages by reason of his loss of possession of the property which was his homestead. Trial was had before a jury and resulted in a judgment finding all the issues for the defendants and fixed the amount of their recovery at $3,766. From this judgment the plaintiff appealed.

The record discloses that the plaintiff took possession of the property immediately upon the execution and delivery of the sheriff's deed. When the court found that judgment and sale were void and set the same aside, the possession of the plaintiff became that of mortgagee in possession. Harding v. Gillett, 25 Okl. 199, 107 P. 665; Page v. Turk, 43 Okl. 667, 143 P. 1047. The plaintiff, being a mortgagee in possession, was entitled to remain in possession until payment of the debt or until it proceeded to the conclusion of the case by a new judgment and foreclosure sale. Webb v. Semans, 110 Okl. 72, 235 P. 1074.

This it attempted to do; it filed the amended petition hereinbefore referred to seeking a new judgment and foreclosure sale. The defendants answered as indicated above. Under the rule announced in Brown v. State National Bank of Shawnee, 167 Okl. 366, 29 P. 2d 955, the defendants could not maintain an action in ejectment to quit title or for rents and profits against the plaintiff, mortgagee in possession, without first tendering payment of the mortgage debt. However, as in this case where the plaintiff proceeds by the filing of an amended petition seeking a new judgment and foreclosure sale, the defendants are entitled to an adjustment of all equities between the parties; and may demand an accounting of all rents and profits; and may cross-petition for dam-

ages for waste and wrongful conversion of personal property committed by the mortgagee in possession: Gillett v. Romig, 17 Okl. 324, 87 P. 325; Romig v. Gillett, 187 U. S. 111, 23 S. Ct. 40, 47 L. Ed. 97; Webb v. Semans, supra; Felino v. K. S. Newcomb Lumber Co. 64 Neb. 335, 89 N. W. 755, 97 Am. St. Rep. 646; Whiting v. Adams, 66 Vt. 679, 30 A. 32, 25 L. R. A. 598, 44 Am. St. Rep. 875; Beindorf v. Thorpe, 126 Okl. 157, 259 P. 242, 55 A. L. R. 1014; Conner v. Smith, 88 Ala. 300, 7 So. 150; Onderdonk v. Gray, 10 N. J. Eq. 65. The contention made by plaintiff that the defendants cannot maintain a cross-petition for possession to quiet title or for damages after breach of condition without first offering to redeem and tendering payment of the mortgage debt is untenable.

The record discloses that the renewal note in question in the amount of $9,050 was executed and delivered by the defendants on the 3rd day of October, 1931 (the original note was executed May 23, 1928); that such amount was the balance due on the mortgage debt to the plaintiff as disclosed by its record after crediting same with the amount paid on the instalment stock certificate. The trial court over a general objection by the plaintiff admitted evidence as to certain transactions and payments made prior to the execution of such renewal note for which the defendants claim that credit should have been given. In this connection the defendants introduced evidence as to all monthly payments made by them before the renewal note was executed. They claim credit for all such monthly payments. They also introduced evidence concerning the payment of $350 to the contractors and $857 to the building and loan company at the time the building was completed and before the key thereto and possession thereof were delivered to them by the building and loan company. They say that these two checks were required of them before the building and loan company would give possession. In this connection, they also claim that the building and loan company had guaranteed to them that the entire cost of the building in question and expense of whatsoever nature in connection therewith would not exceed the amount of the original loan, to-wit, $11,000. They contend that these payments made by said checks were in excess of the loan and therefore they were entitled to credit therefor.

Where one gives a note in renewal of another note with the knowledge at the time of a partial failure of consideration for the original note, or false representations by the payee, he waives such defense and cannot set it up to defeat a recovery on the renewal note. And where one giving such a note either had knowledge of such facts and circumstances, or by the exercise of ordinary diligence could have discovered them and ascertained his rights, it becomes his duty to make such inquiry and investigation before executing a renewal note; and if he fails to do so, he is as much bound as if he had actual knowledge.

Remund v. Liberty National Bank of Weatherford, 168 Okl. 580, 35 P. 2d 457; Tudor v. American Investment Company of Enid, 163 Okl. 274, 21 P. 2d 1056.

As to these two checks the defendant, Bennett Graff, who issued the checks testified in substance that he was required by the building and loan company to issue the checks and deliver them to it in payment of "just a bill he handed me for $857"; that he made no inquiry as to what items the bill covered; whether or not it was for principal, interest or for extras. He said that all he knew about it was that they handed him the bill and said he would have to pay it before he could get the key to the building; that he made no further inquiry about what these payments were for. The defendant's testimony does not disclose that any inquiry was ever made thereafter as to whether or not credit had been made on the original note for these amounts. There were many monthly instalment payments made thereafter and before the execution of the renewal note in question, and Graff made six monthly payments as provided in the renewal note. In this connection the plaintiff's testimony is to the general effect that it rendered to the defendant Bennett Graff, an itemized statement, which is disclosed by the record, showing just exactly why the two checks were required of him. It contends that the defendants had full knowledge of all the transactions regarding these checks at the time the checks were delivered. This itemized statement in the record bears a date previous to the date the checks were issued and the date defendant, Bennett Graff, says they were delivered.

We hold under the facts in this case that the defendants either had full knowledge of the facts and circumstances surrounding and preceding the execution of the renewal note now complained of, or by the exercise of reasonable diligence they could have ascertained the facts and know their rights; that it was their duty to do so before executing the renewal note. By their action they have waived such defense to the renewal note. The amount due on the renewal note, therefore, is the amount thereof less such payments made and credits accruing thereon after its execution.

RIGHTS OF ACCOMMODATION INDORSER

Davis v. Holt, Kansas City Court of Appeals, Missouri, 154 S. W. Rep. (2d) 595

Where president and directors of bank became indorsers on note held by bank solely in order that bank might secure cash thereon, it was held that they were accommodation indorsers, and as such,

NOTE—For similar decisions see Banking Law Journal Digest (Fifth Edition) §26.

they were entitled to be reimbursed by the bank as the accommodated party, after paying off the note, in an action for money had and received, notwithstanding that the bank indorsed the note "without recourse."

In this case plaintiffs, as president and directors of bank, indorsed a note held by bank so that bank might sell or pledge note. The note was thereafter transferred to another bank. None of the plaintiffs personally received any benefit from the transaction. Upon demand by the holder of the note, the plaintiffs were required to pay the balance remaining unpaid on the note. The only defense pleaded was that because the bank indorsed the note "without recourse" it was not liable to any person for the payment of same. Plaintiffs did not seek relief by suit on the note but on the theory that they loaned their credit to the bank and that the bank thereby received a certain amount of cash, which was actually furnished by plaintiffs. It was held that the plaintiffs were accommodation indorsers and as such they were entitled to be reimbursed by the accommodated party, after paying off the note, in an action for money had and received.

Suit by Harley A. Davis and others against R. W. Holt, Commissioner of Finance in charge of Fayette Bank of Fayette, Missouri, to establish a common claim against the assets of the Fayette Bank, wherein the Federal Deposit Insurance Corporation, by leave of court, intervened. From a judgment for plaintiff against defendant and intervenor, the defendant alone appeals.

Affirmed.

A. W. Walker, of Fayette, for appellant.

John H. Windsor, of Boonville, for respondents.

Hunter & Chamier, of Moberly, for intervenor.

SPERRY, C.—Harley A. Davis, William J. Shaw and Alva Kirby, plaintiffs below, sued R. W. Holt, Commissioner of Finance in charge of Fayette Bank, of Fayette, Missouri, defendant, seeking to establish a common claim against the assets of the closed bank. The Federal Deposit Insurance Corporation, by leave of court, became an intervenor in said suit. Judgment was for plaintiffs against defendant and intervenor, from which judgment defendant only has appealed. The parties will be referred to as plaintiffs and defendant.

Plaintiffs pleaded that prior to April 7, 1938, a Mr. Lay was indebted to the bank on notes aggregating $10,000; that on the above date he executed and delivered to the bank his note of that date, in the principal sum of $10,000, due 180 days after date, and secured the payment of same by chattel mortgage covering certain live stock therein described; that after delivery of said note and chattel to the bank "and for the purpose of obtaining cash on said note and said chattel mortgage for the benefit of said Fayette Bank said note was indorsed on the back thereof 'Without recourse to Fayette Bank, by Alva Kirby,

Pres.' "; that it was then signed on the back thereof by plaintiffs and by a Mr. Redford; that thereafter said note and chattel were delivered to the First National Bank of Kansas City, which bank gave the Fayette Bank credit on its books for $10,000; that thereafter the Fayette Bank failed; that the security mentioned in the chattel mortgage was liquidated and applied on said note by the Kansas City bank, and that plaintiffs, upon demand, paid the Kansas City Bank the balance remaining unpaid on said note; that none of plaintiffs received any benefit from said transaction but that Fayette Bank, only, benefited thereby. Plaintiffs prayed judgment for establishment of a common claim in the amount of $5,835.15, together with interest, against the assets of the closed bank.

The answer admits execution of the note by Lay; its indorsement by plaintiffs; its delivery to the Kansas City bank; and, receipt by the Fayette Bank of the cash proceeds therefrom, $10,000. It is then alleged in said answer that the Fayette Bank, "acting by its president, Alva Kirby, assigned said note in blank without recourse on it; . . . denied that said note is now an asset of said Fayette Bank."

The evidence was to the effect that plaintiff Kirby was president of the bank and that plaintiffs Davis and Shaw were members of the board of directors; that prior to April 7, 1938, Mr. Lay was indebted to the bank in the sum of $28,500, and the bank held his promissory notes therefor; that the legal limit of credit which the bank might extend to any one customer was about $8,500; that on the above mentioned date Mr. Lay executed a promissory note for $10,000, due 180 days after date, payable to said bank, and secured the payment of same by execution of a chattel mortgage and by the assignment of a life insurance policy; that Fayette Bank, by Alva Kirby, president, indorsed said note without recourse; that a few days later, at the request of plaintiff Kirby, plaintiffs Shaw and Davis, and a Mr. Redford, each separately, at different times, and not in the presence of each other, indorsed their names on the back of said note; that Mr. Lay was not present when this was done nor was it done at his request; that this was done because the state banking department had complained of the "overloan" to Mr. Lay and the note was so indorsed in order that the bank might sell or pledge it to the First National Bank of Kansas City for cash.

The evidence further tended to prove that immediately after this transaction was completed the Fayette Bank delivered this note to the Kansas City bank which bank gave credit on its books to the Fayette Bank; that the proceeds were used to pay off two of Mr. Lay's notes which were held by the Fayette Bank, said notes totalling some $9,700; that on November 2, 1938, the Fayette Bank became insolvent and thereafter the collateral held as security for payment of said note was liquidated and credited thereon by the Kansas City bank and, on its de-

mand, plaintiffs paid said Kansas City bank the balance remaining due thereon, $5,835.15.

The petition herein states a cause of action for money had and received. Carter v. Farmers Bank of Chariton County, 232 Mo. App. 705, 108 S. W. 2d 152, loc. cit. 156. The facts are not in dispute. The only defense pleaded is that because the bank indorsed the note "without recourse" it was not liable to any person for the payment of same. Plaintiffs do not seek relief by suit on the note but on the theory that they loaned their credit to the bank and that the bank thereby received $5,835.15, cash, which was actually furnished by plaintiffs, and which it now retains.

Defendant urges that the judgment is erroneous because it is against both defendant and intervenor. Intervenor did not appeal and, certainly, defendant cannot be injured merely because a third party suffered a judgment. This complaint should be ruled against defendant.

Defendant, in this court, for the first time, interposes the defense of estoppel. He contends that plaintiffs are estopped to assert a claim for this money. No such defense was pleaded or asserted in the trial court and it cannot ordinary be asserted, for the first time, in the appellate court. Standard Investment Company v. Stephens-Meier, Mo. App., 117 S. W. 2d 620, loc. cit. 623. No mention is made of estoppel in his motion for new trial. Under such circumstances we will not consider the point.

Defendant contends, however, that intervenor pleaded estoppel. Be that as it may, intervenor did not appeal and, estoppel being an affirmative defense, defendant cannot have the benefit of it simply because another, who is not in this court, may have asserted it in his own defense. To hold otherwise would be to say that every defense asserted by each of several co-defendants becomes a defense for all other co-defendants. There is a difference between such a situation as is here presented and one where a defendant obtains an erroneous instruction which materially affects the liability of another co-defendant, or which affects the substantial rights of plaintiff on the whole case.

Finally, defendant says that the facts in evidence disclose that plaintiffs are not entitled to the relief sought because they are bank directors who acted in an effort to relieve a situation which came into existence by reason of their own unlawful acts in extending credit to Mr. Lay in excess of that authorized by statute. The evidence fails to disclose who the directors were at the time these loans to Lay were made, or whether same were made with the consent or acquiescence of either of the plaintiffs. So far as the record here is concerned, this overloan may have been made years ago by other directors, or over the objections of any or all of the plaintiffs. Many of the necessary elements of this defense, if it is a good defense, have not been established by any evi-

dence whatever. We must, therefore, rule the point against defendant.

Plaintiffs signed the note and became indorsers solely in order that the bank might secure cash thereon. None of plaintiffs received any part of the proceeds of the note, but the bank did receive the whole thereof. Plaintiffs are, therefore, accommodation indorsers. 11 C. J. S., Bills and Notes, § 737. As such they are entitled to be reimbursed by the accommodation party, after paying off the note, in an action for money had and received. 11 C. J. S., Bills and Notes, § 750; Union National Bank v. Lyons, 220 Mo. 538, 119 S. W. 540; Ferrell v. Milford State Bank, Mo. App., 19 S. W. 2d 312.

The facts in the case at bar are not materially different from those involved in the last above mentioned case. There recovery was permitted to the cashier and a member of the board of directors who borrowed money on their own credit and placed it in the bank. They took out of the bank a customers note owned by the bank, which latter note was later surrendered to the receiver. A claim was allowed against the assets of the defendant bank on the theory of "money had and received."

Judgment affirmed.

LIABILITY OF SELLER OF TRAVELERS' CHECKS

Transcontinental & Western Air, Inc., v. Bank of America N. T. & S. A., District Court of Appeal, California, 116 Pac. Rep. (2d) 791

Where plaintiff agreed to sell travelers' checks issued by defendant bank and employee who was in charge of plaintiff's office with authority to sell the checks, negotiated the checks for his personal use, it was held that defendant bank was liable to all holders of the checks who were innocent of the employee's wrongdoing, and the plaintiff was liable to the bank for the value of the checks.

In this case plaintiff agreed to sell travelers' checks issued by defendant bank. The checks were to be sold by plaintiff to the traveling public at a sale price of ¾ per cent above their face value. Of this profit on the sales ½ per cent was to be retained by plaintiff as its commission, the remaining ¼ per cent was to be remitted by plaintiff to the bank. The employee, in charge of plaintiff's office, who had authority to negotiate the travelers' checks issued by defendant bank for sale at plaintiff's office, appropriated the proceeds from the sale of the checks to his personal use.

It was held that the innocent holders of the travelers' checks, which were negotiated by the employee in charge of plaintiff's office, would not be allowed to suffer the loss occasioned by the dishonesty

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §1559.

of the employee who appropriated the checks by stealthily issuing them for funds for his own use. Defendant bank, therefore, was liable to all holders of the checks who were innocent of the employee's wrongdoing, and the plaintiff was liable to the bank for the value of the checks. The employee, in issuing the checks, was acting within the scope of his employment for the plaintiff, which was liable for the checks even though the employee exceeded his authority by withholding the proceeds received by him from the sale of the checks.

Action by Transcontinental & Western Air, Incorporated, against the Bank of America N. T. & S. A., to recover amount of travelers' cheques which had been delivered by the defendant to the plaintiff for sale and were negotiated by plaintiff's employee who converted the proceeds. From an adverse judgment, the plaintiff appeals.

Affirmed.

Tripp, Penney & Callaway, of Los Angeles, for appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson and John E. Walter, both of Los Angeles, for respondent.

MOORE, P. J.—Plaintiff appeals from a judgment entered in favor of defendant upon an agreed statement of facts.

Plaintiff operates certain airline transportation routes in the United States. In connection with its airlines, it maintains offices for general business traffic and ticket sales in a number of cities. Defendant is a national banking association with its principal office in the City of San Francisco. It maintains many other offices in California. Incidental to its general banking business, it issues and sells travelers cheques.

Pursuant to an agreement between the parties accomplished by correspondence, on or about September 22, 1938, plaintiff forwarded to defendant a list of travel offices and names of persons in charge. Shortly thereafter it forwarded travelers cheques in the amount of $4,000 to each of such offices. The cheques were to be sold by plaintiff to the traveling public at a sale price of ¾ per cent above their face value. Of this profit on the sales ½ per cent was to be retained by plaintiff as its commission, the remaining ¼ per cent was to be remitted by plaintiff to the bank.

When the first shipment of travelers cheques was forwarded to plaintiff's St. Louis office, one Ole May was stationed at plaintiff's San Francisco office. For several days prior to November 11, 1938, May was a "District Traffic Agent" of the St. Louis office and as manager thereof had access to the travelers cheques received by that office. On November 11th May disappeared. Five days later plaintiff discovered that the shipment of cheques in the amount of $4,000 was missing. Subsequent to the disappearance of May and prior to February 28, 1939, he sold the cheques which he took from the St. Louis office in the amount of $2,810 for his personal use. The cheques so negotiated by

May came duly to the office of the bank and were honored on divers days from the 15th of November, 1938, until March 2, 1939. Thereafter, on the 27th day of May, 1939, May called at an office of the bank in the City of Los Angeles and delivered the balance of the unsold cheques in the sum of $1,190 to an officer of defendant.

After demands by the bank for the payment of the cheques negotiated by May, defendant charged and deducted from the account of plaintiff the sum of $2,810 without the consent of plaintiff. This action followed. This discussion disposes of all of appellant's contentions.

All of the correspondence which constituted the contract between the parties was between plaintiff and defendant. Attached to the letter directed to plaintiff at its St. Louis office by defendant, under date of September 27, 1938, was a receipt which contained the same terms and conditions as set forth in identical receipts forwarded at the same time to all other offices of plaintiff. The language of that receipt is that the plaintiff "agrees to observe the same care and protection in the custody of the Travelers Cheques as would be given a like amount of currency; to hold the said Travelers Cheques in trust for the Bank of America National Trust and Savings Association; that said Travelers Cheques and proceeds of the sale thereof shall be held separate and apart from the assets of the undersigned, to be fully responsible for their due issue and for the prompt remittance to the Bank of America of the procedes of the sale thereof, and to notify the Bank of America National Trust and Savings Association promptly in case of loss or theft of said Travelers Cheques.

Plaintiff received the cheques at its St. Louis office October 3, 1938. That it undertook the sales thereof is emphasized by the language of plaintiff in a letter to the bank wherein it mentioned the "possibility of our handling your travelers checks . . . you notify this office of all shipments of travelers checks made to our various agents . . . confine sales to our city traffic offices where our personnel can devote the proper time to selling . . . will advise our personnel to accept your stock and begin sales . . . a list of our traffic offices and the names of persons in charge is also attached. . . . Bank of America travelers checks will be available for sale at all T.W.A. traffic offices." This establishes a contract of agency between plaintiff and defendant. It betakes of nothing of the nature of a joint adventure. Plaintiff, having promised to make the sales for a profit, directed its employees to sell and issue the cheques. The bank had nothing to do with the transfer of May to the St. Louis office and had had no contact with him prior to or during the time he was manager of that office. At the time the cheques were forwarded that office was under the management of one Craden. May appeared immediately thereafter. He was there as an employee of plaintiff. As an instrumentality of plaintiff, he took possession of the

cheques. Having received the cheques in order to make sales of them, plaintiff thereby became defendant's agent. Carter v. Rowley, 59 Cal. App. 486, 211 P. 267.

In no sense was May an agent of the bank. The bank exercised no direction or control over the employees of plaintiff with respect to the handling of the cheques. Plaintiff's agents in charge of its various offices negotiated the sales of the cheques solely because plaintiff had authorized defendant to forward them to the several managers of its farflung offices. Moreover, while there was nothing in the correspondence requiring plaintiff to employ agents to sell the cheques, yet it appears repeatedly that the cheques were to be sold by appellant's employees. So far as the bank was concerned, plaintiff might have replaced any employee handling the cheques at any of its offices with another employee without consulting defendant. All of the services to be performed in the sales of the cheques was to be done by plaintiff and its own organization.

In making the sales plaintiff could act only through its own officers and employees. The acts of such parties in the performance of the business of the plaintiff were acts of the corporation itself. Having agreed to act as the agent of defendant for a consideration, plaintiff became liable for the fulfillment of the covenants undertaken. American Soda Fountain Co. v. Stolzenbach, 75 N. J. L. 721, 68 A. 1078, 16 L. R. A., N. S., 703, 127 Am. St. Rep. 822; Killingsworth v. Portland Trust Co., 18 Or. 351, 23 P. 66, 7 L. R. A. 638, 17 Am. St. Rep. 737; Wells-Dickey Co. v. Embody, 82 Mont. 150, 266 P. 869; Restatement of the Law of Agency, § 406.

It is fundamental that if a duty of the master be violated by his employee the master is liable the same as though he personally were guilty of the breach. Such liability of the master is not obviated by the fact that his servant acted contrary to instructions and criminally. Muehlebach v. Paso Robles Hotel Co., 65 Cal. App. 634, 225 P. 19. The fact that the faithlessness of the employee in committing the wrong may amount to a felony does not alter the obligation of the agent to his principal so long as the servant is acting within the scope of his employment. Ibid; Hiroshima v. Pacific Gas & Electric Co., 18 Cal. App. 2d 24, 63 P. 2d 340; Grigsby v. Hagler, 25 Cal. App. 2d 714, 78 P. 2d 444. Because May exceeded his authority in withholding proceeds received by him from the sales of the cheques does not relieve plaintiff; in issuing the cheques he was acting within the scope of his employment. Grenada Bank v. Moore, 131 Miss. 339, 95 So. 449. Whether plaintiff was a gratuitous bailee or served for hire it was liable for the cheques.

We have observed the distinction of those cases involving the recovery of damages (1) where property is delivered to another and it is

stolen by or destroyed by reason of the negligence of an employee, from (2) those cases where property is delivered to another and is stolen by some one not in the relationship of employee. The cases cited by appellant come within the second classification with the exception of two. Miller v. Citizens' National Trust & Savings Bank, 1 Cal. App. 2d 470, 36 P. 2d 1088, and Copelin v. Berlin Dye Works & Laundry Co., 168 Cal. 715, 144 P. 961, L. R. A. 1915C, 712. The latter cases do not apply here. The facts in each of them show that the wrongful act in question was entirely unrelated to the purposes of the agency or was committed independent of the transaction of the principal's business. Grigsby v. Hagler, supra. As to the Miller case, it was emphatically disapproved in Rutherford v. Rideout Bank, 11 Cal. 2d 479, 80 P. 2d 978, 117 A. L. R. 383. The case of Copelin v. Berlin Dye Works & Laundry Co., supra, was distinguished by the court in Muehlebach v. Paso Robles Hotel Co., supra, where the court pointed out that the cleaning company assumed no duty of safekeeping the jewelry and delegated no such duty to its servants. In each of the cases of Perera v. Panama-Pacific International Exposition Co., 179 Cal. 63, 175 P. 454, and Travelers Fire Insur. Co. v. Brock & Co., 30 Cal. App. 2d 112, 85 P. 2d 905, the jewelry was taken by a thief who was not an employee.

Plaintiff was liable for the safety of the cheques by the terms of the receipt which accompanied their shipment. While it was indeed never signed by plaintiff yet the facts that it accompanied the cheques and that its provisions were the substance of the prior correspondence make it binding upon plaintiff. This receipt notified plaintiff that it was to "observe the same care and protection in the custody of these Travelers Cheques as would be given to a like amount of currency . . . to hold said travelers cheques in trust for the bank"; to hold the cheques and proceeds of sale "separate and apart from T.W.A. assets . . . to be fully responsible for their due issue and for prompt remittance (to bank) of the proceeds of sale thereof." By the acceptance of the cheques accompanied by this declaration of plaintiff's obligations, the latter undertook the responsibility of the due issuance of the cheques. All of the duties imposed by the terms of the receipt were breached by plaintiff.

Appellant contends that by paying all of the cheques negotiated by May at the time of their presentation, the bank's voluntary acts defeat its right to charge the account of plaintiff. This claim in effect is that the several bona fide holders of the cheques issued and appropriated by May to his own use must stand the loss of the sums paid for the cheques. To grant such contention would serve to destroy public confidence in negotiable paper. Cheques in the sum of $2,810 were issued by May for his personal use. The bank had no information that any payee had knowledge that May had negotiated the cheques

without the consent of the bank. This made the indorsee of each of the illicitly issued checks a bona fide holder thereof.

May had authority to sell the cheques and to cause the signature of the purchaser to be filled in at the proper places. Under the negotiable instruments law, where a check is in the hands of a holder in due course a valid delivery of the instrument is conclusively presumed to have been made by all parties prior to him. Civ. Code, sec. 3097. Even though the cheque might have been stolen from its maker prior to its delivery, yet such theft is not a defense against a bona fide holder for value. Northern Pacific R. R. Co. v. Spokane Valley Growers' Union, 132 Wash. 607, 232 P. 691, 43 A. L. R. 194; American Express Co. v. Anadarko Bank & Trust Co., 179 Okl. 606, 67 P. 2d 55, 110 A. L. R. 972. Inasmuch as the cheques were complete at the time they came into the hands of innocent holders, the latter will not be allowed to suffer the loss occasioned by the dishonesty of an employee who appropriated the cheques by stealthily issuing them for funds for his own use. American Express Co. v. Anadarko Bank & Trust Co., supra; Cooke v. United States, 91 U. S. 389, 23 L. Ed. 237. In the latter case it was held that treasury notes printed and ready to issue and which were stolen and placed in circulation passed title to bona fide purchasers for value. The holders of the cheques wrongfully issued by Ole May to himself having come into the possession of bona fide holders, the title gained by such holders was superior to that of the bank. Each cheque on its face was free from suspicion of the illegal act of May; no holder had any notice. It follows that the purchaser of any of such cheques in good faith was not required under any principle embodied in the universal negotiable instruments law to inform himself of the history of the cheque before he could with safety acquire legal ownership thereof. So universal is the use of commercial paper, such as the travelers cheques in question, that it should have the same freedom of circulation as a government bond. This is possible only by giving to it the sanctity of the promise of a saint by encircling it with the arm of the law. Any other method of treating such paper in the channels of trade and commerce would interfere with the normal flow of business transactions. Chemical National Bank v. Kellogg, 183 N. Y. 92, 75 N. E. 1103, 2 L. R. A., N. S. 299, 11 Am. St. Rep. 717, 5 Ann. Cas. 158. If a travelers cheque, after the blanks are filled, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands. Secs. 3095, 3097, Civ. Code; secs. 14 and 16 N. I. L.

The case of a stolen blank travelers cheque which had been later filled out is not parallel to the case at bar. But to the extent that it may be likened to the act of May, it has been disposed of by the courts of this state. People v. Cohen, 71 Cal. App. 367, 235 P. 658. It was there held that a cheque, although blank at the time of the taking, was

of substantial value; and that the thief was liable for the actual value to the lawful owner. In the case of Northern Pacific R. R. Co. v. Spokane Valley Growers' Union, supra, the defendant had signed an entire book of checks in blank and placed them in its safe. A bookkeeper having access to the checks filled in his name as payee in a number of them and cashed them at divers institutions. When the checks were received by the purchasers from the faithless bookkeeper, they were complete and did not upon their faces indicate that they were other than genuine. The purchasers thereof having paid the full face value at the time of acquiring them, a valid delivery of the cheques was conclusively presumed by all of the predecessors of him who in due course presented them for payment.

The law merchant, the history of the customs of bankers and tradesmen, the oft-enacted and revised statutes in occidental states guaranteeing the regularity and integrity of negotiable instruments regularly obtained in due course—the confluence of these and other economic forces has so fortified negotiable paper that in the absence of proof of notice of any covert vice in its issuance or endorsement, it is binding upon its maker. The fortunes and conveniences of commerce render it imperative that such paper should circulate with such character as to reassure all holders of its security. 4 Cal. Jur. 15. The cheques issued by May to himself were of that character. Consequently defendant became liable to all holders thereof who were innocent of May's wrongdoing and the cheques not having been returned to the bank before being acquired by innocent holders plaintiff is liable for their conversion. Appellant held them as bailee under agreement "to be fully responsible" for their due issue and for the prompt remittance to the bank. That created an absolute liability for the safe return of them or of their value. 4 Cal. Jur. 16, 20.

Finally, the judgment must be affirmed upon another theory, towit, the negligence of plaintiff. When promissory notes or cheques are endorsed in blank and they pass into the hands of innocent purchasers through the negligence of those who have their custody, the payors cannot escape their obligation because the instruments were stolen. Phelps v. American Mortgage Co., 40 Cal. App. 2d 361, 104 P. 2d 880; Allen Grocery Co. v. Bank of Buchanan, 192 Mo. App. 476, 182 S. W. 777. The cheques were forwarded to May pursuant to plaintiff's express instructions. He had authority to sell the cheques and to instruct the purchasers how to fill in the blanks. Since the theft of the cheques resulted solely from plaintiff's negligence it must suffer the loss occasioned by its own neglect. "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Civ. Code, sec. 3453.

Judgment is affirmed.

CONSTRUCTION OF "PERSONAL PROPERTY" IN WILL

Equitable Trust Co. v. Clavey, Court of Chancery of Delaware, 21 Atl. Rep. (2d) 719

A will provided for a bequest to testator's employee of all of the contents of a hardware store, and all other articles of "personal property" in the building except the contents of testator's apartment. It was held that this provision would not be construed to mean the hardware business so as to include accounts receivable and bank balance.

Suit by the Equitable Trust Company and others, executors of the last will and testament of Alfred D. Peoples, deceased, against Vaughan Clavey and others for a consrtuction of the will of Alfred D. Peoples, deceased.

Decree in accordance with opinion.

Suit for a construction of the will of Alfred D. Peoples, brought by his executors. The respondents are the beneficiary of a specific bequest, and the trustee and cestuis que trustent of a gift, in trust, of the residue of the estate. Heard on the bill, answers of the respondents and stipulation.

Charles F. Richards (of Richards, Layton & Finger), of Wilmington, for complainants.

Paul Leahy (of Southerland, Berl, Potter & Leahy), of Wilmington, for Vaughan Clavey.

John J. Morris, Jr., and Albert W. James (of Hering, Morris, James & Hitchens), both of Wilmington, for Rebecca Peoples Hall and others.

THE VICE-CHANCELLOR.—Alfred D. Peoples died in Wilmington in 1939, unmarried and without issue. By the first Item of his will he made a gift to a business associate, Vaughan Clavey, one of the respondents. He made various other specific gifts and left his residuary estate in trust, all for the benefit of his sister, nieces, nephew and cousin, his nearest relatives. The question raised is whether certain property was included in the gift to Vaughan Clavey, or whether it passed under the residuary clause. The pertinent Item reads thus:

"Item 1. I give and bequeath to Vaughan Clavey, of the City of Wilmington, Delaware, in recognition of his faithful services, all of the contents of my hardware store known as No. 507 Market Street, Wilmington, Delaware, except the contents of my apartment on the second

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §1609.

floor, which I specifically bequeath in Item of this will. This bequest to him includes all bought and sold in the hardware business and all other articles of personal property in said building except the said contents of my apartment. I also give and bequeath to him the note of his Mother Sallie Ann Clavey, for Twenty Five Hundred Dollars. I direct and will, that he shall not be required to pay any rent for the store or any part of the building No. 507 Market Street, for a period of six months from the date of my death."

Certain facts concerning the testator and his property were alluded to by the solicitors as having a bearing upon the construction of the will. In 1879, the testator engaged in the hardware business, and from 1898 to the time of his death, he was the sole proprietor of a hardware store at 507 Market Street in Wilmington. There he spent his time, except while away on pleasure trips which he frequently made. In 1905, the respondent Clavey was employed as a clerk in the store, and in 1910, became manager of the business under the general supervision of the testator. Clavey bought all goods from manufacturers and wholesalers, passed on the credit of the store's customers, and kept the keys to the store property, as well as to a safe located in the store. He also held a power of attorney from the testator for the drawing of checks on a bank account which, although maintained in the testator's name individually, was used exclusively in connection with the hardware business. At the testator's death, the balance in the account exceeded $7,000. The merchandise and fixtures in the store had an appraised value of about $19,000. The accounts receivable were approximately $9,500, and the accounts payable, $8,300. In the safe in the store were found the note of Sallie Ann Clavey for $2,500, mentioned in the will, besides cash, a watch and chain, certificates for certain debentures, stock certificates, a bond and warrant of attorney, and checks, all of which had an appraised value of, roughly, $6,200. The entire estate had a value of many times the foregoing items.

The respondent Clavey puts forward two alternative constructions of the gift to him. First, he says that the language of the will should be construed as a gift of the hardware "business" as a whole and as a going concern, and that consequently, the balance in the bank account and the receivables (subject to the accounts payable) are comprehended. Cases are cited for the proposition that a gift of a business includes such items as these. Even conceding this, it still remains to be established that the subject of the gift described in the will is the hardware business. In each of the authorities cited, there was a gift in terms of a business, with the exception of the case of In re Lowe, 149 App. Div. 347, 134 N. Y. S. 537, Affirmed 206 N. Y. 671, 99 N. E. 722. There, a gift of the testatrix' "printing office and bindery, together with all the presses, bindery machinery, type, paper on hand, office furniture and equipment of every nature connected with said business" was,

under the circumstances of that case, construed to mean a gift of the business. The language of the present will is distinguishable. There is no express gift of the business; and the construction contended for would necessitate reading into plain language, a forced and unnatural meaning, wholly unnecessary for the accomplishment of a reasonable scheme of distribution of the testator's property. The fact that the testator recognized Clavey's long and faithful services surely does not require that the scope of the gift should receive an enlargement beyond the bounds which the language would normally dictate. The provision that Clavey should not be required to pay rent for the building for six months, coupled with the gift of the contents of the store, may well show that the testator did not intend that the good will of the enterprise should pass as a separate property right to the residuary donees. Indeed, the latter make no contrary contention. But that does not make it necessary, or even reasonable, to construe the gift of the contents of the building to mean the hardware business so as to embrace the accounts receivable and the bank balance.

The other construction urged by Clavey is that if the language be deemed not to constitute a gift of the hardware business, nevertheless, the expression "all of the contents" embraces the merchandise and fixtures, the safe, the watch and chain, the cash, checks and bond, the stock and debentures represented by certificates found in the safe, and also the bank balance represented by the deposit book; that the words "all bought" in the hardware business mean all of the merchandise whether paid for or not; and that "all . . . sold in the hardware business" means the right to collect money due for goods sold, that is, the receivables. The residuary donees do not dispute that the items of tangible property, including those found in the safe, were a part of the gift to Clavey. They do deny that the intangibles were comprehended.

Clavey's contention with respect to the accounts receivable seems somewhat strained. The expression beginning "all bought and sold" clearly means all things which are bought and sold in the conduct of the hardware business, that is, the merchandise.

The use of the expression "all of the contents" is a loose way to designate the subject of a bequest, and frequently gives rise to questions as to what property the testator meant his language to embrace. Winkler, Ex'r, v. Woodruff et al., 21 Del. Ch. 147, 182 A. 409. However, in the absence of some indication otherwise, the general scope of the expression is to be given its full effect. Winkler, Ex'r, v. Woodruff et al., supra; Old Colony Trust Co. v. Hale, 302 Mass. 68, 18 N. E. 2d 432, 120 A. L. R. 1207. In the latter case, a distinction is drawn between a gift of the contents of a house and a gift of the contents of a particular receptacle, such as a chest or safe; to the effect that unless a

different intent appears, the former gift does not include intangibles, but the latter may, where some tangible representation or evidence of the property, as for example, a stock certificate or bond, constitutes a part of the contents. This distinction is given support by authorities cited in the annotation following the Massachusetts case, in 120 A. L. R. 1210.

Here, there are other indications of the meaning to be ascribed to the gift of the "contents." In the same item of the will, the testator states that the gift includes the merchandise "and all other articles of personal property in said building except the said contents of my apartment." The expression "all other articles of personal property," as so used, manifestly denotes tangibles only. Merrill v. Winchester, 120 Me. 203, 113 A. 261; 6 C. J. S., Article, p. 776. Still in the same item, but as a separate bequest, the testator gives to the same donee a note for twenty-five hundred dollars, which was found in the safe. If he had intended the preceding descriptive words to comprehend intangibles, this would not have been necessary. Thus, in designating property to be included in the gift of the "contents," he mentions only tangibles; whereas, the one intangible referred to is the subject of a separate gift. The effect of the context, it seems to me, is to tip the scales in favor of a construction limiting the scope of the word "contents" to tangible property.

A decree in accordance with this opinion will be advised.

INDORSER OF NOTE HELD PRIMARILY LIABLE UNDER TERMS OF NOTE

W. F. Brown & Sons, Inc., v. Easterly, Court of Appeal of Louisiana, 4 So. Rep. (2d) 73

A note contained the following promise on its face: "One year after date, I, or we, the signers, indorsers, sureties, or any of us, promise in solido to pay to the order of W. F. Brown & Sons, Inc., Amite River Bank, Denham Springs, La., one thousand seventy-five & no/100 Dollars, for value received, with interest from date at the rate of 8 per cent per annum, with all cost of collection, including ten per cent attorneys fees." The note was signed "Merchants & Farmers Selling Assn., By S. B. Easterly" and was indorsed on the back before delivery by S. B. Easterly and defendent. It was held that under the terms of the note the defendant made himself primarily and unconditionally liable for its payment as to the payee and holder to the same extent and in the same manner as though he had signed on the face of the note as a maker.

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §684.

Action on a note by W. F. Brown & Sons, Inc., against Ernest E. Easterly. From a judgment for the plaintiff, defendant appeals.

Affirmed.

Elliott & Elliott, of Amite, for appellant.

Reid & Reid, of Hammond, for appellee.

OTT, J.—The plaintiff alleges that it is the holder and owner for a valuable consideration before maturity of a certain promissory note executed by the Merchants & Farmers Selling Association for the sum of $1,075, dated February 4, 1936, due one year from date, payable to the order of plaintiff, with interest at the rate of 8 per cent per annum from date, and providing for ten per cent attorneys' fees; that said note was endorsed before delivery by S. B. Easterly and Ernest S. Easterly. The note is annexed to the petition and made part thereof.

This suit is against Ernest S. Easterly alone to recover the amount of the note, interest and attorneys fees, with reservation by plaintiff of any rights it may have against "the Merchants & Farmers Selling Association and the heirs of S. B. Easterly, who is now deceased."

The principal defense set up by defendant Easterly is that there was no consideration flowing from plaintiff to the maker of the note, the Merchants & Farmers Selling Association, a corporation, hereafter called the Association; that said Association owed plaintiff nothing and received no consideration whatever for said note; that said note was and is not a binding and enforceable obligation against said maker and, accordingly, defendant Easterly, as endorser, cannot be held liable on a note which is invalid for lack of consideration to the maker.

The answer of Easterly sets up in detail the reason for his endorsement of said note, in substance, as follows: that in June, 1931, the plaintiff sold to S. B. Easterly and this defendant certain property in Denham Springs for a consideration of $12,000, of which amount the sum of $4,000 was paid in cash, and for the balance of $8,000, the two Easterlys executed six notes, secured by vendor's privilege and special mortgage on the property, which notes matured annually over a period of six years, with interest of eight per cent per annum from date until paid; that said S. B. Easterly and defendant became financially involved and were unable to pay said mortgage notes, and after four of the notes had matured, the plaintiff demanded that the property be re-transferred to it without allowing them any credit for the cash payment made on the property, and in addition thereto, that said S. B. Easterly execute and deliver to it a note of the said Association, endorsed by S. B. Easterly and defendant herein, Ernest S. Easterly, said re-transfer to extinguish and cancel all indebtedness on account of the mortgage and vendor's privilege notes which they had given in the purchase of said property.

As a further reason for endorsing the note herein sued on, defend-

ant alleges that he and S. B. Easterly were indebted to a local bank in a large amount which they were unable to pay, and that this bank was controlled by the plaintiff, and he feared that plaintiff would induce said bank to press him and S. B. Easterly on said indebtedness unless he and said S. B. Easterly re-transferred to plaintiff the property which they had purchased from it and endorsed the note for $1,075 herein sued on.

And as an alternative defense, the defendant alleges that if there was ever any liability on the part of said Association on said note (which liability is denied for the reason, as stated, that no consideration was received therefore and for the further reason that S. B. Easterly was never authorized to issue the note for said Association) then any liability on account of said note has been discharged by reason of the dissolution and liquidation of said Association as a corporation in 1938, as no claim was urged by the plaintiff herein during the process of said liquidation which was carried on according to law and by giving notice to all creditors.

From a judgment in favor of plaintiff against the defendant for the full amount of said note, interest and attorneys fees, the latter has appealed.

The note which forms the basis of this suit contains the following promise on its face: "One year after date, I, or we, the signers, endorsers, sureties, or any of us, promise in solido to pay to the order of W. F. Brown & Sons, Inc., Amite River Bank, Denham Springs, La., one thousand seventy-five & no/100 Dollars, for value received, with interest from date at the rate of 8 per cent per annum, with all cost of collection, including ten per cent attorneys fees." The note is signed "Merchants & Farmers Selling Assn., By S. B. Easterly," and is endorsed on the back by S. B. Easterly and this defendant.

Under the terms of the note above quoted the defendant made himself primarily and unconditionally liable for its payment as to the payee and holder to the same extent and in the same manner as though he had signed on the face of the note as a maker. Bonart v. Rabito, 141 La. 970, 76 So. 166; Continental Bank & Trust Company v. Bouterie et al., La. App., 169 So. 812; Section 192 of Act 64 of 1904, the Negotiable Instrument Law.

This defendant is therefore bound on the note to the same extent as a maker of principal. He has not pleaded lack of consideration flowing to him to support the obligation on his part as one primarily and unconditionally bound for the payment of the note. "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value." Section 24 of Act 64 of 1904, Dart's Gen. Stat. 813.

Even though the maker of the note might not be liable on it for want of a valuable consideration or because the person signing the note for the Association had no authority to do so, the defendant cannot escape his primary and unconditional obligation to pay the note unless he alleges and proves that neither he nor any of the others primarily liable on the note received no consideration, in which case the promise of all parties to the note as to their immediate payee would be nothing more than a nudum pactum.

Instead of allegations and proof on the part of defendant that he received no consideration for binding himself primarily and unconditionally to the plaintiff, the answer which he filed and the evidence produced on the trial show that both he and S. B. Easterly received consideration for thus binding themselves unconditionally to pay the note. They were obligated to plaintiff under past due mortgage notes in the sum of $8,000, with 8 per cent per annum interest on that amount for more than four and a half years. As a consideration for the release of this obligation on their part, they retroceded the property to plaintiff which they had purchased from it and had used during this period, and in addition thereto unconditionally bound themselves to pay plaintiff the note herein sued on.

Learned counsel for defendant insist that, as the deed of retrocession recites that the re-transfer is made in consideration of the cancellation of the mortgage notes and interest due by the transferors on the property and nothing is said in the deed about this note as additional consideration, parol testimony is inadmissible to show that the consideration for the note was their release from liability on these mortgage notes. But this is not a suit attacking or affecting the deed of retrocession, in which case the parties to that deed might be precluded from denying the consideration mentioned in the deed, or in showing additional consideration, in order to support or nullify the transaction. Here the testimony was to show a consideration for the note sued on and was admissible for that purpose even though it did show a different consideration from that recited in the deed of retrocession. See McConnell v. Harris Chevrolet Co., Inc., La. App., 147 So. 827, and cases there cited.

The alternative defense to the effect that the liquidation of the Selling Association and its discharge from any liability which it might have incurred as maker of said note, is likewise untenable, as the liability vel non of said Association could have no effect on the primary liability of this defendant who can be sued on the note irrespective of any liability of the Association thereon. Beaird Corporation v. Johnson, La. App., 152 So. 789.

For the reasons assigned, the judgment appealed from is hereby affirmed at the cost of appellant in both courts.

SAVINGS BANK ACCOUNTS IN NAME OF HUSBAND AND WIFE

Steinmetz v. Steinmetz, Court of Chancery of New Jersey, 21 Atl. Rep. (2d) 743

Where savings bank accounts were opened in the name of husband and wife and the moneys on deposit in such accounts prima facie belonged to them equally, it was held that the wife's withdrawal of all moneys in the accounts while the husband was alive and insane destroyed the joint tenancy so far as the wife's interest was concerned, including her right to have the joint funds as survivor.

In this case there was no evidence that when the accounts were opened the parties intended to immediately vest in wife absolute title to the entire funds therein or to give her sole control over the funds during the joint lives of husband and wife. By taking absolute possession of the entire joint funds the wife became a tenant in common of the funds to the extent of her one-half interest. She held the half share of her husband co-tenant as agent or trustee for him, which half share her husband's administrator could recover from wife.

Suit by Albert C. Steinmetz, Jr., administrator, etc., against Elizabeth Steinmetz and others, to recover from Elizabeth Steinmezt one-half of certain money which such defendant withdrew from savings accounts which stood in the name of herself and her husband and for other relief.

Decree in accordance with opinion.

Levitan & Levitan, of Jersey City, for complainant.

William H. Bradley, of Hoboken, for defendant Elizabeth Steinmetz.

Henry W. Kellner, of Cliffside Park, for defendant Robert P. Steinmetz.

FIELDER, V. C.—Albert C. Steinmetz, Sr., and Elizabeth Steinmetz were married July 12, 1920, on which day a savings account was opened in the Hudson Trust Co. with a deposit of $3,000 in the name "Albert Steinmetz ond Elizabeth Steinmetz" and on the bank's signature card, above the signatures of the parties, were the words, "This account is opened by us and intended to create a joint estate to us as joint tenants and not as tenants in common."

They opened another savings account in the Trust Company of N. J. November 27, 1923, for $200 in the name "Elizabeth Steinmetz or Albert Steinmetz" and on the bank's signature card, above the signatures

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §436.

of the parties, were the words, "This account and all moneys to be credited to it belong to us as joint tenants and will be the absolute property of the survivor of us; either and the survivor to draw."

No evidence was offered to show the purpose or intent of the parties in opening the accounts, except as can be gathered from their form and the signature cards. The evidence does not disclose the source of the initial deposits with which the accounts were opened (but it is alleged in the bill and admitted by Mrs. Steinmetz's answer that Albert Steinmetz made the deposit of $3,000 which opened the account in the Hudson Trust Co.), nor does it disclose whose money was thereafter, from time to time, deposited in the accounts. Several withdrawals were made from each account, all on drafts signed by Mrs. Steinmetz alone.

The form of deposit used for the two accounts is evidence of a gift by each joint owner to the other of any money deposited therein by either, to take effect in praesenti and under such forms of deposit (in the absence of evidence to the contrary) any balance remaining to the credit of the accounts, so long as they continued to exist, would, on the death of either joint owner, belong to the survivor. Commercial Trust Co. v. White, 99 N. J. Eq. 119, 132 A. 761, affirmed, 100 N. J. Eq. 561, 135 A. 916.

March 16, 1931, both accounts were closed by drafts drawn by Mrs. Steinmetz. From the Hudson Trust Co. account she withdrew the entire balance of $4,128 and from the Trust Company of N. J. account she withdrew the entire balance of $4,166.30. The same day she closed the accounts she opened two new savings accounts, both in the name "Elizabeth Steinmetz or Kate Doll," one in the Hudson Trust Co. for the same amount withdrawn from the closed account in that bank and the other in the Trust Company of N. J. for the same amount withdrawn from the closed account in that bank.

There can be no doubt that when Mrs. Steinmetz withdrew all the funds in the two accounts which stood in the name of her husband and herself, she had reason to know that her husband was mentally incompetent. He was committed to a state institution for the insane March 28, 1931, and remained there until his death February 4, 1940. A son by a former marriage (the complainant here) was appointed administrator of his father's estate. He brings this suit to recover from Mrs. Steinmetz one-half of the money she withdrew from the two savings accounts which stood in the name of her husband and herself.

There is no evidence that when those two accounts were opened the intention of the parties was to immediately vest in the wife absolute title to the whole of the funds therein, or to give her sole dominion and control over them during their joint lives. On the contrary, under the forms of deposit the husband had an equal right with his wife, while both were alive, to withdraw funds therefrom and he also had the right

to receive the entire balance remaining to the credit of the accounts in the event he should survive her. At the time Mrs. Steinmetz closed the accounts the money on deposit therein, in the absence of any evidence to the contrary, prima facie belonged to the husband and wife equally and each stood in the relation of agent or trustee for the other to the extent of the other's interest in the joint funds. But the wife took advantage of her husband's disability and seized the entire joint funds in an inequitable attempt to deprive him of all interest and rights therein. Had he then not been under disability and had he brought suit against his wife for accounting for his share of their joint funds, there can be no doubt that on the facts as disclosed in this case he would have been adjudged to have an interest in the joint funds. O'Connor v. Dunnigan, 158 App. Div. 334, 143 N. Y. S. 373, affirmed, 213 N. Y. 676, 107 N. E. 1082.

In the case of joint tenancy in personal property four unities must continue to exist, viz.; Unity of interest, title, time and possession. Either joint owner may destroy one or more of the constituent unities in such manner as to sever his interest from the joint fund and so destroy its existence, thereby ending his right of survivorship. Schouler on Personal Property, 5th Ed. sec. 160; Morristown Trust Co. v. Capstick, 90 N. J. Eq. 22, 106 A. 391 affirmed, Morristown Trust Co. v. Safford, 91 N. J. Eq. 152, 108 A. 926; Dover Trust Co. v. Brooks, 111 N. J. Eq. 40, 160 A. 890. By Mrs. Steinmetz's act she severed the unity of interest and possession which had theretofore existed between her husband and herself and she thereby destroyed the joint tenancy so far as her interest was concerned, including her right to have the joint funds as survivor. The joint accounts no longer existed and she made herself a tenant in common of the joint funds to the extent of her one-half interest therein and she held the half share of her co-tenant as agent or trustee for him.

The defendant Elizabeth Steinmetz will be decreed to pay complainant, as administrator, the sum of $4,147.15 with interest from March 16, 1931. In determining the rate of interest to be charged against her, consideration should be given to the fact that she kept said sum on deposit in savings bank accounts until December 29, 1936, when she took in her own name an assignment of a mortgage made by Theodore Doll and wife to Adolph Lohman and wife, dated August 26, 1920, on which, at the date of the assignment to her, the principal sum of $6,000 was due with interest from January 1, 1937, which interest she has since regularly received. She paid the consideration for the assignment by withdrawing $3,000 from each of the savings accounts which stood in the name of "Elizabeth Steinmetz and Kate Doll."

The bill alleges, further, that at the time of the death of Albert Steinmetz he owned a substantial amount of real and personal property of which Mrs. Steinmetz took possession and refused to deliver

to complainant and complainant's prayer is that she account to him therefor. By her answer she denied such allegation and on the hearing of the cause the sole proof adduced to support complainant's allegation was that Mrs. Steinmetz maintains a savings account in the Guttenberg Bank & Trust Co. opened May 17, 1937, in the name "Elizabeth Steinmetz and Robert Steinmetz," but no evidence was produced to show that any money deposited in that account was ever the property of Albert Steinmetz.

The defendants named in the bill beside Elizabeth Steinmetz are Kate Doll and Robert Steinmetz. As to Kate Doll the bill alleges that she has no interest in the two savings accounts which stand in her name jointly with Elizabeth Steinmetz, at least to the extent of the moneys claimed by complainant. She was duly served with process but made no appearance in the suit. Complainant may have a decree against her in line with said allegation in his bill. The defendant Robert Steinmetz filed an answer disclaiming interest in the savings account which stands in his name jointly with Elizabeth Steinmetz, but denying that the moneys deposited therein were ever the property of Albert Steinmetz. As to him, the bill will be dismissed.

LIABILITY OF SAVING BANK ON LOAN APPLICATION

Schleifer v. Worcester North Savings Institution, Supreme Judicial Court of Massachusetts, 37 N. E. Rep. (2d) 255

The Massachusetts statutes, which require applications for loans to be approved by the board of investment, shield a savings bank against contractual obligations not incurred in accordance with the statutes, but, in the absence of appropriate language, the court may not extend their operation so as to exempt savings banks from liability for deceit or other torts under rules of law applicable to persons and corporations in general.

In this case plaintiff brought an action against defendant bank for deceit on the ground that when the owner of a certain parcel of property sought to induce plaintiff to lease and improve the property, the president of the bank holding the mortgage on the property falsely represented that the directors of the bank had voted to extend and increase the mortgage. It was held that the evidence was sufficient to warrant a finding that the plaintiff had sustained the burden of proving that, in reliance upon the manifestation of ostensible or apparent authority of the bank president, plaintiff executed the lease involved, that he was damaged in consequence, and that the proximate cause of his loss was the misrepresentations

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §1361.

of the bank president as to the action of the board of investment of the bank with relation to an extension of the mortgage on the premises involved and a further loan thereon.

Action of tort by Louis Schleifer against the Worcester North Savings Institution for deceit. Verdict for plaintiff for $5,000. On defendant's exceptions to the denial of its motion for a directed verdict.

Exceptions overruled.

D. J. Lyne and W. A. Ryan, both of Boston, for defendant.

H. Singer, of Boston, for plaintiff.

DOLAN, J.—This is an action of tort for deceit in which the plaintiff seeks to recover for damage sustained by him as a result of alleged misrepresentations by the president of the defendant bank. The case was here before on exceptions to the action of the judge at a prior trial in directing a verdict for the defendant on the plaintiff's opening on his count for deceit, the count in contract having been waived. At that time the plaintiff's exceptions were sustained. Schleifer v. Worcester North Savings Institution, 306 Mass. 226, 27 N. E. 2d 992. The case comes before us, after a second trial, upon the defendant's exceptions to the denial of its motion for a directed verdict in its favor.

There was evidence to warrant the jury in finding the following facts: In 1931 the title to a certain parcel of real estate, located in Fitchburg in this Commonwealth, was acquired by the General Luggage Corporation. The property was held by it subject to a mortgage of $115,000 to the defendant bank. No interest on the mortgage or taxes had been paid after the corporation acquired the property. To better its condition with relation to the property the luggage corporation, by one Williams, its president, late in 1932 began negotiations with the plaintiff looking toward a long term lease of the premises to him. Williams informed the bank of these negotiations through one Brown, the bank's president, early in 1933. In May, 1933, "the indebtedness of the corporation to the bank had risen from $115,000 to something over $138,000."

Brown became president of the defendant bank, hereinafter referred to as the bank, on January 1, 1933. Prior thereto and since 1912 he had served as its treasurer. He received a substantial salary, gave all his time to the bank's affairs, and was the only officer whose desk was located in the "front" part of the bank's premises. An amendment to article 9 of the by-laws of the bank, adopted upon the accession of Brown to the office of president, provided that he should preside at the meetings of the corporation and of the board of trustees and should be "ex-officio a member of the Board of Investment." The amendment further provided that he should be the executive officer of the bank and should have and exercise the general supervision and management of

all of the powers given to the treasurer by the by-laws and by statute "unless such authority is inconsistent therewith." Under articles 14 and 15 of the by-laws it was provided that "The Board of Investment shall have the investment of all moneys of the Bank, in which they shall be governed by the Statutes of the Commonwealth and the Rules established by the Board of Trustees," but that the treasurer "shall not pay out any money loaned upon real estate until the certificate of the Committee of the Board of Investment shall have been duly filed and the papers approved by the Solicitor." Under article 12, it was provided that the clerk "shall keep a faithful record of the doings of the corporation at their meetings, and also of the Board of Trustees."

During 1933 Brown handled much of the correspondence of the bank and talked with many persons who desired to do business with the bank. He often discussed loans with applicants and received applications therefor, which he would frequently refer to the board of investment. At the trial he was unable to point out any instance in which the board had declined to follow his recommendations with regard to a loan. "Most of the applicants for mortgage loans talked only to Mr. Brown and no one else." In some instances applications for loans were rejected by him without referring them to the board of investment. "It was customary for . . . [him] to tell people what the board had done."

Brown had negotiated the transaction when the luggage corporation acquired the premises in question in 1931 and gave the bank a purchase money mortgage in the amount of $115,000. In March, 1933, he notified an attorney for the luggage corporation that the board had voted to take no action on a proposal of that corporation to lease the premises, and its request for continued cooperation of the bank for the rest of the year. The "board" had so voted on March 7, 1933.

The plaintiff, a real estate broker and operator, is a resident of New York. He was not acquainted with Brown before he commenced negotiations with Williams relative to leasing the property. He first met Brown "in December of 1932 or January of 1933." He talked with him on three or four occasions on the subject matter of the proposed lease. During the late winter and spring of 1933, lengthy negotiations took place between Williams, his attorney, and Brown concerning an adjustment of the financial relations of the corporation and the bank on a more stable basis. These negotiations took place both by mail and in person, and Williams kept the plaintiff fully informed of their progress. In March, 1933, Williams showed Brown a rough draft of a proposed lease and told him that he had a prospective lessee. Brown suggested the insertion of an "inflation clause" in the lease and that the deposit under the lease should be paid to the bank. Williams told him the deposit would have to be paid to the broker. Late in March Williams and the plaintiff talked with Brown at the bank. The plaintiff

then stated that he could not make a lease unless the default in the mortgage was cured. Brown said that the bank would co-operate.

At a meeting between Williams and the plaintiff and Brown at the bank in April, 1933, the plaintiff informed Brown that a lease had been agreed upon, and that the only thing he was concerned about was an extension of the mortgage. At this conference Brown told the plaintiff that the mortgage would be extended for ten years, and that an additional $25,000 would be lent by the bank ot take care of all arrears. He added that if they (the plaintiff and Williams) wanted to be sure they could come back in a few hours after the board meeting. They did so and Brown then informed them that the "Board of Directors [sic] . . . had voted to advance an additional $25,000 and would extend the mortgage for ten years." Relying on Brown's representations the plaintiff signed a lease of the premises on May 1, 1933, and shortly thereafter took possession of the property. In fact, the board had not voted to extend the mortgage or to advance further funds, and the luggage corporation had never made any application for the loan in writing in accordance with G. L. (Ter. Ed.) c. 168, § 16, § 54, First. The plaintiff was not aware of these facts and made no inquiries as to Brown's authority or the by-laws of the bank. On May 19, 1933, the board of investment considered the " 'proposed lease' by General Luggage Corporation and voted to take no action." At the time of the execution of the lease the plaintiff, in accordance with its terms, deposited $12,-541.66 wih the luggage corporation to secure performance of his covenants thereunder. None of this money has been returned to him. He also expended $1,000 for repairs and alterations. Foreclosure proceedings were commenced by the bank on June 13, 1933, and after they were completed the attorney for the bank wrote to the plaintiff under date of July 18, 1933, requesting him to leave the premises. The plaintiff then left the premises.

There was also evidence that the plaintiff had "lined up six prospective tenants; that if Brown's statements were true he [the plaintiff] could make $15,000 or $20,000 a year"; that "hise lease on May 1, 1933 was worth between $65,000 and $75,000"; and that he believed Brown, had acted in reliance upon his representations as to the action of the board.

After denying the defendant's motion for a directed verdict the judge submitted to the jury the following special question: "At any time prior to May 1, 1933, did Mr. Brown say to the plaintiff in words or in substance that the Board of Investment of the defendant had voted to extend the mortgage held by it upon the property in question for ten years and to advance an additional $25,000?" The jury answered "Yes."

There is no material variance between the facts set forth, which

the jury could find properly on the evidence, and those stated by the plaintiff in his opening at the prior trial which, when the case was here before, were held sufficient, if proved, to warrant a finding by the jury for the plaintiff on the count in tort for deceit. Schleifer v. Worcester North Savings Institution, 306 Mass. 226, 27 N. E. 2d 992. The principles of law applicable to the facts which the jury could find are fully set forth in that case with ample citation of authorities. To recite those principles in detail here would serve no useful purpose. On the evidence the jury could find properly that Brown had wide actual authority in the supervision and management of the bank; that in his dealings with Williams and the plaintiff he was engaged in ordinary routine business of the bank concerning negotiations for loans and mortgages; that he was a member of the board of investment; that he had habitually interviewed applicants for loans; that his recommendations regarding them were invariably followed by the board of investment; and that he notified applicants of the dispositions made of their applications by the board, that he made the representations in question to the plaintiff; that the plaintiff relied upon them to his damage, and that Brown had ostensible or apparent authority to make them in behalf of the defendant. There is nothing in the record to show that Brown was without authority to notify those seeking loans of the decisions of the board. On the contrary, the jury could find that Brown had been held out to the community where the bank was located and to its customers as having sweeping authority even with reference to making known the votes of the board.

That the plaintiff was a resident of New York and had never dealt with the bank before is not decisive. The question whether Brown was clothed with ostensible or apparent authority is one of fact. Federal National Bank of Boston v. O'Connell, 305 Mass. 559, 566, 26 N. E. 2d 539. The jury could find that the negotiations between Brown and the plaintiff were carried on for over four months, during which the plaintiff conferred with Brown at the bank on a number of occasions, and that Williams had dealings with the bank through Brown over a considerable period of time, including negotiations concerning the proposed lease of which he kept the plaintiff advised. In these circumstances we think the jury were not required to find that Brown had not been held out to the plaintiff by the bank as having ostensible or apparent authority to deal with him in the manner before recited.

It is true that the evidence would require findings that no application was made in writing for a further loan as required by G. L. (Ter. Ed.) c. 168, § 16; § 54, First, as amended; but it cannot be said as matter of law that the plaintiff was not justified in believing that the statutory law requirements had been complied with, as well as any by-laws of the bank relating to the granting of loans or extensions of mortgages. As is said in Schleifer v. Worcester North Savings Insti-

tution, 306 Mass. 226, at page 229, 27 N. E. 2d 992, at page 994, "Doubtless the statutes to which the defendant refers do shield a savings bank against contractual obligations not incurred in accordance with them . . . but in the absence of appropriate language we are not authorized to extend their operation so as to exempt savings banks from liability for deceit or other torts under rules of law applicable to persons and corporations in general."

The evidence would warrant the jury in finding that the plaintiff had sustained the burden of proving that, in reliance upon the manifestation of ostensible or apparent authority of Brown, he executed the lease involved, that he was damaged in consequence, and that the proximate cause of his loss was the misrepresentations of Brown as to the action of the board of investment of the bank with relation to an extension of the mortgage on the premises involved and a further loan thereon. Schleifer v. Worcester North Savings Institution, 306 Mass. 226, 27 N. E. 2d 992, and cases cited.

The denial of the defendant's motion for a directed verdict was right.

PROOF OF NOTICE TO INDORSER

Allied Mercantile Corporation v. Blatt, Supreme Court, 29 N. Y. Supp. (2d) 376

Where plaintiff established that negotiable instrument was protested and notice of protest was properly served on defendant, who was the indorser of the negotiable instrument, it was held that the mere denial by the defendant of receipt of notice was insufficient to overcome the notarial certificate and the testimony of the notary.

Action by the Allied Mercantile Corporation against Theodore Blatt involving a negotiable instrument. From a judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District, in favor of defendant, plaintiff appeals.

Judgment reversed and judgment directed for plaintiff.

Louis Levine, of New York City, for appellant.

Nathan P. Baker, of Brooklyn, for respondent.

PER CURIAM—Plaintiff established that notice of protest was properly served on the endorser, the defendant. The mere denial by the defendant of receipt of notice is insufficient to overcome the notarial certificate and the testimony of the notary. See Title Guarantee & Trust Co. v. Geller, 254 App. Div. 574, 2 N. Y. S. 2d 784, and Trusts & Guarantee Co. v. Barnhardt, 270 N. Y. 350, 354, 1 N. E. 2d 459.

Judgment reversed, with $30 costs, and judgment directed for the plaintiff as claimed in the summons, with costs.

Judicial Trends

Digest of Decisions on Depositor's Duty to Examine Returned Vouchers and Report Irregularities to Bank

A bank depositor who neglects for a period of three years to examine statements and canceled checks returned to him by his bank, will not be permitted to hold the bank responsible for paying a series of checks which were not properly countersigned, where an examination of the statements would have disclosed the first of such improperly signed checks and so prevented further loss. Phillip v. First National Bank, Ill., 18 N. E. Rep. (2d) 57. 56 B. L. J. 86.

An agreement signed by a depositor authorizing a bank to send his statement and canceled checks by mail and agreeing to notify the bank "of any error, and to make any claim for credit or refund within ten days after the expiration of the time covered by the statement," is so unreasonable as to be void. However, apart from any such agreement, a depositor is bound to exercise due care in examining his statement and reporting irregularities to the bank. Frankini v. Bank of America, Cal., 88 Pac. Rep. (2d) 790. 56 B. L. J. 521.

Where the negligence of the drawer of a check issued to a deceased or non-existent person is the proximate cause of the payment of the check on a forged indorsement of the payee, the drawer of the check cannot recover from the collecting bank. New England Trust Company v. Federal Reserve Bank of Boston, Municipal Court of Boston, Mass. 57 B. L. J. 735.

A state statute provided that "no bank shall be liable to a depositor for the payment by it of a forged or raised check unless within three months after the return to the depositor of such check, such depositor shall notify the bank that the check so paid was forged or raised." It was held that the statute was not intended to relieve the depositor from all duty to act for the three-month period, but was intended to fix a maximum time within which notice of forgery could be given to the bank and to leave the common law duty of the depositor otherwise unimpaired. Consequently, the depositor was still under the duty to examine within a reasonable time the periodical statement of account

and canceled checks delivered to him by his bank and promptly notify the bank of forgeries. McCormick v. Rapid City National Bank, S. D., 293 N. W. Rep. 819. 57 B. L. J. 834.

Where a depositor's clerk forges his signature as drawer on checks and the depositor fails to discover the forgeries over a long period of time, because he permits the clerk to check up his bank statements, the bank will nevertheless be liable if it appears that the bank was negligent in paying the checks. Wussow v. Badger State Bank, Wisc., 234 N. W. Rep. 720. 48 B. L. J. 391.

The defendant bank paid a series of checks drawn by the plaintiff upon forged indorsements. The plaintiff could have discovered the fraud by proper examination of the first statement returned to him by the bank and could thus have prevented subsequent payments. This the plaintiff neglected to do. It appeared that the bank was negligent in not discovering the forgeries. It was held that the bank was liable notwithstanding the plaintiff's neglect. Union Tool Company v. Farmers & Merchants National Bank, Cal., 218 Pac. Rep. 424. 40 B. L. J. 847.

A drawee bank which pays checks on which the indorsement of the payee is missing cannot charge them against the drawer's account; the drawee may, however, recover the amount from a bank by which the checks were presented and collected. City Trust Co. v. Botting, 248 N. Y. Supp. 204. 48 B. L. J. 609.

Where a bank pays a series of checks upon which the signatures of the depositor are forged, the loss falls on the depositor if his negligence in failing to examine the bank's statements and so discover that checks were being forged against his account was the cause of the loss. If the bank's negligence in failing to discover that the signatures on the checks were forgeries caused the loss, it must bear the loss. Southwest National Bank of Dallas v. Underwood and Wood, Texas, 36 S. W. Rep. (2d) 141. 48 B. L. J. 339.

Where a depositor employs a public accountant to examine his bank statements and the accountant fails to discover that certain checks were paid on forgeries of the depositor's signature, the depositor has performed his duty to the bank in this regard and the bank is liable to him for the amount of the checks. Takenaka v. Bankers' Trust Co., 229 N. Y. Supp. 459. 45 B. L. J. 793.

Where a bank depositor discovers that an employee has made an unauthorized use of checks entrusted to him by the depositor, the latter must give notice to the bank within a reasonable time; otherwise, the bank will be relieved from liability. National Surety Co. v. Stockyards Nat. Bank, Colo., 272 Pac. Rep. 470. 46 B. L. J. 169.

When a depositor's pass book and paid checks are returned to him by the bank, he is under a duty to the bank to examine the statement for irregularities and unauthorized payments. The examination must be made within a reasonable time and with reasonable care, and if any irregularities, such as forged or altered checks, are discovered, they must be reported to the bank without delay. The depositor's negligence in this regard relieves the bank from liability for irregular payments for which it might otherwise be liable. The depositor is not required to conduct the examination with such extreme care that it will necessarily lead to the discovery of every erroneous payment, and he may entrust the examination to a clerk or other agent. If the bank has been negligent in paying forged or other irregular checks, it will be liable to the depositor even though he made no examination of his account. National Bank of Commerce v. Tacoma Mill Co., 182 Fed. Rep. 1; Manufacturers' Nat. Bank v. Barnes, 65 Ill. 69; Dana v. National Bank of the Republic, 132 Mass. 156; Frank v. Chemical Nat. Bank, 171 N. Y. 219, 63 N. E. Rep. 696, 57 L. R. A. 529; Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96; First Nat. Bank v. Allen, 100 Ala. 476, 14 So. Rep. 335; New York Produce Exchange Bank v. Houston, 169 Fed. Rep. 785; National Dredging Co. v. President, Del., 69 Atl. Rep. 607. 32 B. L. J. 177-179.

Where a check bearing a forged signature is returned by the drawee bank to the depositor and he retains it for seven days without discovering the forgery and reporting it to the bank, the question whether he has exercised proper care is one for the jury. Bank of Black Rock v. B. Johnson & Son, Ark., 229 S. W. Rep. 1. 38 B. L. J. 504.

The plaintiff corporation drew a check payable to its own order on a Spokane bank in which it kept an account. The check was transmitted to the plaintiff's Portland branch where it was indorsed to the order of the defendant bank in which the plaintiff also kept an account. The plaintiff's cashier whose authority was limited to depositing the check in the defendant bank cashed it and misappropriated the proceeds. In an action against the defendant bank to recover the amount of the check it was held that the plaintiff was chargeable with notice of the defalcation as an examination of the statements submitted by both the drawee bank and the defendant would have revealed it. The plaintiff's failure to make the discovery and to notify the bank thereof within a reasonable time barred a recovery. General Cigar Co., Inc. v. First National Bank, U. S., 290 Fed. Rep. 143. 40 B. L. J. 716.

McKeen & Co. were depositors in the Boatmen's Bank. On April 13, 1895, the bank paid a check, on which the signature of McKeen & Co. was forged, charged the check to their account, and on April 15th, balanced their pass book, and returned all paid checks, including the

forged one to McKeen & Co. The latter signed the customary receipt, which contained this clause: "All claims for reclamations to be made within ten days." No examination was made until May 22nd, five weeks later, when the forgery was discovered. In an action by McKeen & Co. against the bank, the court directed a verdict for the bank. A new trial was granted on the ground that, to absolve the bank from liability, it would have to show that it had sustained a loss as the result of the depositor's neglect. McKeen v. Boatmen's Bank, 74 Mo. App. 281. 15 B. L. J. 269.

Depositor is under a duty to examine the bank's statement of his balance and returned vouchers so as to detect any frauds in the way of forged checks and a failure to perform this duty relieves the bank from liability to the depositor as to forged checks paid by it. First National Bank v. Allen, 100 Ala. 476; Weinstein v. Bank, 69 Tex. 38, 25 B. L. J. 11, 12; Leather Mfrs. National Bank v. Morgan, 117 U. S. 96, 25 B. L. J. 13, 32 B. L. J. 184; England National Bank v. United States, 282 Fed. Rep. 121. 39 B. L. J. 852.

A confidential clerk forged 28 checks, collected them, and destroyed them as returned from the bank. The depositor compared the genuine checks with the check book, but made no comparison with the pass book and never asked the clerk for the check list. It was held that the bank was liable for the checks paid prior to the time when the pass book was first balanced, but not for those paid thereafter. Morgan v. United States Mortgage & Trust Co., N. Y., 101 N. E. Rep. 871. 30 B. L. J. 409; 32 B. L. J. 180.

Where a bank depositor neglects to examine the statements of his account rendered by the bank, the bank will not be liable for amounts withdrawn and misappropriated by the depositor's agent authorized to sign checks against the account. Trust Co. of Norfolk v. Snyder, Va., 138 S. E. Rep. 477. 44 B. L. J. 877.

The Georgia statute providing that a bank shall not be liable to a depositor in paying a forged check unless the depositor notifies the bank of the payment within 60 days after the check is returned to him does not apply to checks wrongfully signed by the husband of the depositor in this form: "Mrs. N. B. Samples, by N. B. Samples." Samples v. Milton County Bank, Ga., 129 S. E. Rep. 170. 42 B. L. J. 821, 840.

Sec. 326 of the New York Negotiable Instruments Law providing that a bank shall not be liable to a depositor for paying a "forged" check unless the depositor notifies the bank of the payment within one year after the voucher is returned to him applies only to checks on which the drawer's signature has been forged and has no application

to a check bearing a forged indorsement. Kleinman v. Chase National Bank, 207 N. Y. Supp. 191. 42 B. L. J. 4.

The question whether a depositor has complied with his obligation to notify his bank that checks bearing a forgery of his signature have been paid is for the jury to decide. Frankini v. Bank of America, Cal., 55 Pac. Rep. (2d) 232. 53 B. L. J. 386.

When paid checks are returned to a depositor, he must compare the checks with his check stubs, compare the bank's balance with the balance shown in his check book and compare the paid checks with the check list returned by the bank. If he fails in this and as a result does not discover and report to the bank a check paid on a forged signature, the bank will not be liable. Stumpp v. Bank of New York, 209 N. Y. Supp. 398. 42 B. L. J. 409.

The cashier of a bank and the employee of a depositor conspired to have a series of checks belonging to the depositor credited to the personal account of the employee. They then appropriated the proceeds. The depositor did not discover the fraud promptly because the examination of the bank's monthly statements was entrusted to the employee. But, after the depositor discovered the fraud, no notice was given to the bank for six months. It was held that the bank was not liable to the depositor. Frederic A. Potts & Co., Inc., v. Lafayette National Bank, N. Y., 199 N. E. Rep. 50. 53 B. L. J. 93.

LEGAL QUERIES AND ANSWERS

By JOSEPH A. NOBILE *of the Massachusetts Bar*

Indorsement

Q. What is the liability of one who makes a note payable to the order of "myself" and indorses it?

A. He is liable only as maker and not as indorser. Louisa County Nat. Bank v. Burr, Ia., 199 N. W. Rep. 359. 41 B. L. J. 567. § 684 B. L. J. Digest.

Indorsement of "Myself" Note Necessary

Q. Is it necessary to indorse a note payable to the order of "myself"?

A. Indorsement is necessary to give such a note negotiability. In re Richardson's Estate, Ia., 208 N. W. Rep. 374. 43 B. L. J. 420. § 678 B. L. J. Digest.

Mortgage Participations

Q. A trust company, acting as trustee under a will, in July, 1931, invested trust funds in participating interests in a mortgage (which the trust company had purchased in October, 1930, in its individual name) without making further inquiry as to the conditions surrounding the investment. Should the trust company be surcharged for a loss sustained by the trust estate?

A. Yes. It was held that the trust company was properly surcharged for loss sustained by the trust estate since a prudent person would have made inquiry in respect to real estate conditions and trends in neighboring property and such an inquiry would have disclosed that investment was not a proper one for trust funds. Trustee must be held to a knowledge of relevant facts readily discoverable at time of investment. In re Dalsimer's Will, 296 N. Y. Supp. 209. 54 B. L. J. 661. § 508 B. L. J. Digest.

Negotiation

Q. A demand note was executed by president and secretary of corporation in favor of the corporation and was delivered to bank by which loan thereon was made. Did the execution of guaranty on reverse side of note by treasurer of corporation individually and as treasurer constitute an "indorsement"?

A. It was held that guaranty did not constitute an "indorsement" and note therefore was not negotiated so that bank took note subject to all of its infirmities. O'Keefe v. Hill ,105 Fed. Rep. (2d) 325.

Notice of Dishonor

Q. Adams, the holder of a note which was not paid at maturity, sues Wright as indorser. Notice was sent Wright by leaving it at his house in charge of a boy, Wright's son. Is the notice of dishonor sufficiently given by leaving it at the residence of the indorser?

A. Yes. Notice of dishonor at a residence may be given "during any of the hours when members of the household are attending to their ordinary affairs." Adams v. Wright, 14 Wis. 408. 30 B. L. J. 372. § 1048 B. L. J. Digest.

Trustee's Liability for Loss

Q. A trust company, acting as trustee under a will, invested $400,000 of trust funds in a purchase money mortgage on antiquated, partly vacant property worth not more than $500,000 and not producing rentals sufficient to pay taxes and interest on the mortgage. Should the trustee be surcharged with the entire amount invested?

A. Yes. In re Lyons Will, 296 N. Y. Supp. 308. 54 B. L. J. 595. § 515 B. L. J. Digest.